Nos. 623-625

In the Supreme Court of the United States

OCTOBER TERM, 1942

OKLAHOMA TAX COMMISSION, PETITIONER

v.

UNITED STATES OF AMERICA

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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 623

OKLAHOMA TAX COMMISSION, PETITIONER

v.

UNITED STATES OF AMERICA

No. 624

OKLAHOMA TAX COMMISSION, PETITIONER

v.

UNITED STATES OF AMERICA

No. 625

OKLAHOMA TAX COMMISSION, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The District Court wrote no opinion; its findings of fact and conclusions of law (R. 30–35, 75–

80, 118–122) are not reported. The opinion of the Circuit Court of Appeals (R. 126–135) is reported in 131 F. (2d) 635.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered November 13, 1942 (R. 135–136). The petitions for writs of certiorari were filed January 5, 1943, and were granted February 15, 1943 (R. 137). The jurisdiction of this Court rests upon section 240(a) of the Judicial Code, as amended by the act of February 13, 1925.

QUESTION PRESENTED

Whether the various sorts of restricted property of deceased allottees of the Five Civilized Tribes are subject to Oklahoma State inheritance taxes.

TREATIES AND STATUTES INVOLVED

The applicable provisions of the treaties and statutes involved will be found in the Appendix, *infra*, pp. 101–115.

STATEMENT

These were three actions brought by the United States to recover estate and inheritance taxes imposed by the petitioner Oklahoma Tax Commission upon the transfer of the estates of three deceased members of the Five Civilized Tribes and paid under protest by the Secretary of the Interior. In each case, the District Court made findings of

fact and conclusions of law and entered judgment for petitioner (R. 30–36, 75–81, 118–123). The Circuit Court of Appeals reversed (R. 126–136).

The inheritance taxes against two of the estates (Nos. 623 and 624) were assessed pursuant to c. 162, Okla. S. L. 1915, as amended by c. 112, Okla. S. L. 1927. The inheritance tax against the third estate (No. 625) was assessed pursuant to c. 66, art. 5, Okla. S. L. 1935. Both statutes tax transfers under the laws of Oklahoma.

Each of the three cases involves the estate of an enrolled, full-blood member of the Five Civilized Tribes and each estate includes real and personal property subject to varying sorts of restriction against alienation. The particular facts of the several cases vary, and the various types of property involved are subject to different types of restrictions. In the interest of clarity, therefore, the following discussion sets out the facts and the legal status of the property with respect to each case and, subsequently, a general summary of the types of property involved.

No. 623. Lucy.—Lucy Bemore was a full-blood Seminole, enrolled opposite No. 1563. She died intestate December 23, 1932, leaving surviving her husband and a son who inherited her estate in equal shares. Her husband is Lewis Bemore, a quarter-blood Creek Indian; her son, Thomas, is an unenrolled full-blood Seminole (R. 31).

The Oklahoma Tax Commission fixed the net value of her estate at $250,630.77, and assessed an

inheritance tax of $5,925.20 (R. 32). Her estate consisted of 39.97 acres of land allotted to her as homestead; 28.07 acres of land allotted as surplus; 43 acres of land purchased for her out of restricted funds and conveyed to her by a restricted form of deed; and $205,008.14 derived from oil and gas royalties and held by the Secretary of the Interior[1] (R. 18–19, 31–32).

The lands of the Seminole Nation were allotted to the individual members at the turn of the century. Acts of July 1, 1898 (30 Stat. 567), and June 2, 1900 (31 Stat. 250). Each member was to select a 40-acre tract which was to be "inalienable and nontaxable as a homestead in perpetuity" (30 Stat. 568); there was no express restriction upon the surplus lands after date of patent.

Subsequent legislation applied to each of the Five Civilized Tribes. The act of April 26, 1906 (34 Stat. 137), provided in section 19 that unrestricted lands should be taxable and that restricted lands should be tax exempt while held by the original allottee. The act of May 27, 1908 (35 Stat. 312), in section 1 restricted until April 26, 1931, the lands of living allottees[2]

[1] The stipulation and agreement of the parties refers to this sum as a "cash credit" derived from oil and gas royalties (R. 19), while Finding III of the trial court indicates that an unspecified portion of the moneys was invested in United States Treasury bonds (R. 31).

[2] The restrictions applied to all the lands of allottees of three-fourths or more blood and to the homesteads of those of more than one-half and less than three-fourths blood.

against "alienation, contract to sell, power of attorney, or any other incumbrance" unless the restrictions were removed by the Secretary of the Interior.[2] The inherited lands, under section 9 of that act, were restricted only in the hands of full-blood heirs who were forbidden to alienate without the approval of the court having jurisdiction of the estate of the allottee.[4] The act of May 10, 1928 (45 Stat. 495), extended the restrictions until April 26, 1956. It also provided, in section 4, that the Indian should select up to 160 acres of restricted land, which "shall remain exempt from taxation while the title remains in the Indian designated * * * or in any full-blood heir or devisee of the land;"[5] restricted lands in excess of the designated 160 acres after April 26, 1931 "shall be subject to taxation by the State of Oklahoma * * * in all respects as un-

[2] Section 1 also removed all restrictions from lands owned by mixed-blood Indians having less than one-half Indian blood and by section 4 declared that all unrestricted land "shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes."

[4] For the purposes of this statement, the various types of restrictions will be viewed as equivalent each to the other. See *Parker* v. *Richard*, 250 U. S. 235; *infra*, p. 57. But if a more precise analysis should be needed, it may be noted that the restrictions take two forms: (*a*) a prohibition against alienation, etc., save with the approval of the Secretary, and (*b*) a prohibition save with the approval of the county court.

[5] Section 4 was amended May 24, 1928 (45 Stat. 733) for the sole purpose of changing "full blood heir *of* devisee" to "full blood heir *or* devisee."

restricted and other lands." Section 3 of this act subjected all minerals, including the royalty interests of Indians, produced from restricted lands after April 26, 1931, to nondiscriminatory taxation.[6] The act of January 27, 1933 (47 Stat. 777), provided in section 1 that where the entire interest in any restricted and tax exempt land was acquired by or for restricted Indians through inheritance, devise, gift or purchase with restricted funds, it should remain restricted and tax exempt during their lives until April 26, 1956.[7]

The restrictions upon the cash and bonds derived from oil and gas leases upon restricted lands are based upon consistent departmental practice, ratified by Congress and uniformly approved by the courts (see *infra*, pp. 67–70). The restrictions against alienation imposed upon living allottees by section 1 of the act of 1908 extended to the leasing of the allotted lands for oil, gas or other mineral purposes save with the approval of the Secretary of the Interior (secs. 1 and 2, act of May 27, 1908). The homestead and surplus allotments of Lucy were leased for oil and gas mining purposes during her lifetime with the approval of the Secretary (R. 18–19). The lease required that

[6] Section 3 was amended February 14, 1931 (46 Stat. 1108), and again on March 12, 1936 (49 Stat. 1160), in respects not here material.

[7] A "restricted Indian" of the Five Civilized Tribes is one of one-half or more Indian blood. *Glenn* v. *Lewis*, 105 F. (2d) 398 (C. C. A. 10).

the royalties accruing thereunder be paid to a representative of the Secretary (R. 23). The moneys and United States bonds to the credit of the estate represent the royalties on oil and gas produced from the leasehold (R. 19). The act of January 27, 1933, provided in section 1 that all funds then or thereafter held by the Secretary of the Interior for Indians of the Five Civilized Tribes of one-half or more Indian blood were restricted and subject to the jurisdiction of the Secretary.* Funds of this nature have by long-accepted practice been viewed as tax exempt. See *United States* v. *Thurston County,* 143 Fed. 287 (C. C. A. 8).

Under these statutes, all of the allotted lands were restricted and tax exempt during Lucy's life (sec. 1 of the act of May 27, 1908; sec. 19 of the act of April 26, 1906), including both the 40-acre homestead and the 28 acres of surplus lands. She designated these lands as tax exempt under section 4 of the act of May 10, 1928 (R. 37). The minerals producted after April 26, 1931, were taxable under section 3 of the act of May 10, 1928, but this act is probably unconstitutional as ap-

*The regulations prescribed by the Secretary of the Interior under section 2 of the act of May 27, 1908, 35 Stat. 312, and related statutes, recognize that the proceeds from oil and gas leases are restricted and require that all such money be paid to a representative of the Secretary. 25 CFR 183.18, 183.20. Similar provisions have been carried in the regulations since 1908. See sec. 20 regulations approved April 20, 1908.

plied to the homestead.[9] The cash and bonds held by the Secretary for Lucy's account were restricted under departmental practice and the act of May 27, 1908, and were therefore tax exempt. The 43-acre tract of purchased land was restricted but not tax exempt.[10]

The half-interest in her property, both real and personal, which descended to her quarter-blood husband became free of all restrictions and was thereafter taxable. The property which descended to her full-blood son remained in the same status which it had been in during Lucy's life.[11]

No. 624. Nitey.—Nitey was a full-blood Seminole, enrolled opposite No. 1446. She died August 17, 1930, and by will devised and bequeathed her estate in equal shares to her five full-blood Seminole children (R. 76).

The Oklahoma Tax Commission fixed the net value of her estate at $677,593.58 (R. 76) and

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[9] The homestead lands under the act of July 1, 1898, were "nontaxable * * * in perpetuity." Since the mineral taxes are probably taxes on the land, section 3 of the 1928 act would seem inapplicable at least during the life of Lucy and perhaps while the lands were held by her heirs. *Choate* v. *Trapp*, 224 U. S. 665; *Carpenter* v. *Shaw*, 280 U. S. 363; 53 I. D. 502.

[10] Title was taken on a restricted deed (R. 31).

[11] The allotted lands in his hands were restricted under section 9 of the act of May 27, 1908, and were tax exempt under the acts of July 1, 1898, and May 10, 1928. The cash and bonds remained restricted, as held for the benefit of the full-blood son. The 43-acre tract of purchased lands was restricted under section 9 of the act of May 27, 1908, but was taxable.

assessed an inheritance tax of $16,053.74 (R. 77). Her estate consisted of 40 acres of land allotted as homestead; 200 acres allotted as surplus; United States Treasury bonds in the amount of $203,812.50 held by the Secretary of the Interior; interest on bonds in the amount of $881.25 likewise held by the Secretary; moneys held by the Secretary in the amount of $513,380.22; some household goods, and a truck (R. 56, 76).

The homestead and surplus allotments of Nitey were the subject of oil and gas leases with the approval of the Secretary (R. 55), and the leases required that the royalties be paid to his representative (R. 61, 68). The cash and bonds represent these royalties (R. 55).

The same statutes which govern the restrictions of Lucy's estate in No. 623 also apply here, with the addition that the restrictions against alienation by full-blood heirs except on the approval of the court having jurisdiction of the estate, contained in section 9 of the act of May 27, 1908, were expressly extended to full-blood devisees by the amendatory act of April 12, 1926 (44 Stat. 239).

Under these statutes, all of the lands were restricted and tax exempt during the life of Nitey (sec. 1 of the act of May 27, 1908; sec. 19 of the act of April 26, 1906. The cash and United

States bonds held by the Secretary of the Interior for her benefit were restricted. The status of the remaining personal property, consisting of household goods and a truck, cannot be determined from this record. A tax exemption certificate was executed on behalf of Nitey on June 23, 1930, under the act of May 10, 1928, which designated her 40-acre homestead and 120 acres of her surplus lands as exempt (R. 49–50, 59). The remaining 80 acres of surplus lands became taxable after April 26, 1931.

In the hands of Nitey's five full-blood children, who took in equal shares under her will, the property had the same status.[12]

No. 625. Wosey.—Wosey Deere was a full-blood Creek, enrolled opposite No. 9546.[13] She died intestate on September 2, 1938. She left surviving her husband, Milford Thomas, a seven-eighths blood Cherokee, and three children who were full-blood Creeks, to whom her estate passed (R. 113).

The Oklahoma Tax Commission fixed the net value of her estate at $318,794.07, and assessed an inheritance tax of $14,908.67 (R. 119–120). Her estate consisted of 40 acres of land allotted as

[12] The lands in their hands were restricted under section 9 of the act of May 27, 1908, as amended by the act of April 12, 1926.

[13] *Board of Commissioners* v. *Seber*, No. 556, this Term, now pending before this Court, involves another tax controversy with respect to the property of Wosey Deere.

homestead; 120 acres allotted as surplus; 160 acres inherited in 1915 from Sakquanny Long, a deceased full-blood Creek Indian; United States Treasury bonds held by the Secretary of the Interior in the amount of $295,304.38; interest on the bonds held by the Secretary in the amount of $2,458.93; moneys held by the Secretary in the amount of $40,772.19; a four-fifths interest in 40 acres of land, the status of which is not shown by the record; a wrecked automobile; a $500 judgment; miscellaneous items valued at $1,511.96; and a life insurance policy for $22,161 (R. 99–101, 118–119).

The lands of the Creek Nation were allotted to the individual members at the beginning of the century. Each member was to select a 40-acre tract as a homestead out of the 160 acres allotted to him. All lands were restricted for five years and the homestead declared to be "nontaxable, inalienable, and free from any incumbrance" for 21 years. Act of March 1, 1901 (31 Stat. 861), as amended by the supplemental agreement in the act of June 30, 1902 (32 Stat. 500). The subsequent legislation traced in No. 623, Lucy, is also applicable here.

The property in the hands of Wosey Deere had the following status: The 160 acres of allotted land, homestead and surplus, were restricted against alienation by section 1 of the act of May 27, 1908, and were tax exempt until April 26, 1931,

under section 19 of the act of April 26, 1906. Wosey Deere selected these lands as tax exempt under the act of May 10, 1928 (R. 119), and, except for mineral taxes under section 3 of that act, they were also exempt from taxation after April 26, 1931. The 160 acres inherited by Wosey Deere from Sakquanny Long in 1915 were restricted in her hands under section 9 of the act of May 27, 1908, and were taxable after April 26, 1931, because in excess of the 160 acres designated under section 4 of the act of May 10, 1928. The cash and bonds held by the Secretary for the benefit of Wosey Deere accumulated from an oil and gas lease on the 160-acre tract inherited from Sakquanny Long in 1915 (R. 100, 119) [14] and were restricted. The record does not disclose the status of the four-fifths interest in 40 acres, the miscellaneous items, the $500 judgment, the wrecked automobile, or the life insurance policy.

The property which passed to Milford Thomas, the seven-eighths blood Cherokee husband, had the same status [15] except for the 160 acres of inherited land; this was restricted but not tax exempt in Wosey Deere's hands after 1931, and the

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[14] The stipulation and agreement of the parties states that the lease was made by Wosey Deere (R. 100). The lease itself (R. 108) shows that it was made by Sakquanny Long during his lifetime.

[15] The act of January 27, 1933, has been construed to preserve the existing restrictions on lands inherited from allottees by Indians of half-blood or more. *Glenn* v. *Lewis*, 105 F. (2d) 398 (C. C. A. 10).

act of January 27, 1933, is therefore inapplicable; under section 9 of the act of May 27, 1908, it passed to the mixed-blood heir free from restrictions and was taxable. The property which passed to the full-blood heirs had the same status as in the hands of Wosey Deere.[16]

Summary. Nos. 623–625.—The decedents are all full-blood allottees of the Five Civilized Tribes. Their heirs and devisees are full-blood members of the tribes, except that one husband (of Lucy) is a quarter-blood Creek and another (of Wosey) is a seven-eighths blood Cherokee.

In the argument which follows, we urge that property which is restricted at the moment of death is beyond the reach of the state inheritance or estate taxes unless Congress has expressly made it taxable. The estate of each decedent is composed primarily of property of this sort.[17] We do not urge that restricted prop-

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[16] The act of January 27, 1933, has been construed not to repeal or modify the prior law permitting full-bloods to convey with county court approval. *United States* v. *Easley*, 33 F. Supp. 442 (E. D. Okla.). The lands were, therefore, restricted under section 9 of the act of May 27, 1908.

[17] (1) Lands restricted in the hands of both the decedent and heir: the allotted lands of Lucy which went to her child; the allotted lands of Nitey (80 acres of which became taxable in 1931, after her death); the 40-acre homestead and 120 acres of surplus lands of Wosey. (2) Lands restricted in the hands of the decedent but unrestricted and taxable in the hands of the heir: all the lands of Lucy which went to her husband. (3) Cash and bonds held by the Secretary subject to restrictions for the benefit of both decedent and

erty which has been made taxable by Congress is exempted under Federal statutes, although one branch of our argument would indicate that it is not covered as a matter of state law. There is some of this property in the estate of two decedents.[18] There are also miscellaneous items in the estates of two of the decedents the status of which cannot be determined from this record.[19]

SUMMARY OF ARGUMENT

I

The Supreme Court of Oklahoma has never passed directly upon the reach of the state inheritance and estate taxes as applied to restricted property of members of the Five Civilized Tribes, but both the statutes and the Oklahoma decisions demonstrate that the state taxes are inapplicable.

A. The state tax statutes apply only to a transfer under state law. The taxes are made liens upon the property which passes at death.

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heir: that of Lucy which went to her child and that of Nitey and Wosey. (4) Cash and bonds held by the Secretary subject to restrictions for the benefit of the decedent but not the heir: that of Lucy which went to her husband.

[18] Lucy's 43 acres of purchased lands (she died before the exempting acts of June 20, 1936, 49 Stat. 1542, and May 19, 1937, 50 Stat. 188), and the 160 acres inherited by Wosey from Sakquanny Long.

[19] Wosey Deere's four-fifths interest in 40 acres; the household goods and truck of Nitey; the wrecked automobile, the $500 judgment, the life insurance, and the miscellaneous items of Wosey.

In addition, the tax laws contain administrative features which serve to control the administration of decedents' estates.

B. The probate system which is applicable to the restricted property of members of the Five Civilized Tribes is rather intricate. The descent and distribution of restricted Indian property in Oklahoma has been governed successively by tribal law, adopted Arkansas statutes, tribal law, Arkansas statutes and Oklahoma statutes, but in each case the governing law has been selected by Congress as its own provision. At present, the state courts determine heirships, and administer unrestricted property, but do not have a general probate jurisdiction. They serve only as Federal agencies, so far as their decisions affect restricted property, which is not "within the jurisdiction of the probate courts of the state." *Jefferson* v. *Winkler,* 26 Okla. 653. The custody of restricted property remains in the Secretary of the Interior who has a discretionary power to remove restrictions and permit transfers of this property.

C. Accordingly, the state inheritance and estate statutes cannot be intended to apply to restricted property. Its transfer is not made under state law. The lien which the statutes impose is impossible of application to the restricted property, and the various provisions giving the probate courts full control over the administrator or the

executor and the decedent's property, cannot be applied. Finally, for a period of 30 years, during which there were several reenactments, the state officials made no effort to collect the tax upon the transfer of restricted property of members of the Five Civilized Tribes, and the effort to collect the tax upon Osage and Quapaw property quickly proved abortive.

II

A. The policy of Congress as to tax exemption of Indian property has been marked by three stages. Until shortly after the Civil War, the Federal Government meticulously guarded the Indians against all forms of state taxation and control. Thereafter, until about 1930, Congress adopted a policy which looked toward the assimilation of Indians into the polity and economy of the several states and which consequently looked toward the break-up of tribal holdings and the individualization of Indian lands, with the correlative anticipation of subjecting these lands to state taxation at one point or another in the course of the Indians' holding. By 1930, it had come to be believed that this policy had proved a failure, and that state taxation was a major cause of Indian landlessness and destitution. Consequently, the years since 1930 have seen a substantial reversal in policy, looking toward increasing the group activities of the Indian and increasing the safeguards given them against state taxation.

B. The traditional instrument of Federal guardianship and Federal protection against state taxation has been the restrictions imposed upon Indian property.

(1) From a time prior to the adoption of the Constitution, and continued for many years thereafter, the United States has imposed stringent prohibitions against the transfer of Indian lands either to states or to individuals. The protection extended to involuntary transfers as well as to voluntary, and was a cardinal feature in the solemn promises given the Creeks and the Seminoles at all stages of their tribal existence. This protection survived the allotment acts in full vigor, so far as the allotted lands were continued in a restricted status. This Court has always construed the restrictions in a broad and generous spirit. So, too, have the courts of Oklahoma. The restrictions took content from the long practice of complete immunity from state control or taxation, and from the treaty promises which continued without abrogation as to the restricted lands. Not infrequently, it is true, the restrictions were accompanied by express tax exemptions, but these were necessary for protection against the territorial governments and their local subdivisions rather than the state government, which was concluded by the restrictions alone. The Oklahoma Enabling Act put the restricted lands out of the taxing jurisdiction of the state. This

Court, the Oklahoma courts, and the Federal courts in Oklahoma have uniformly recognized that express congressional permission is necessary to tax restricted lands or their transfer. The Oklahoma legislature has itself made express recognition of this. None of the taxes which might otherwise be applicable have ever been imposed with respect to restricted Indian property.

(2) The restrictions upon the funds of Indians are based historically upon the restrictions upon the lands from which those funds are derived. By long practice, judicially confirmed, the funds are held by the Secretary of the Interior and subject to his control. The act of January 27, 1933, confirms this practice. Also, by long and judicially confirmed practice the restricted funds are exempt from state taxation.

C. The inheritance and estate taxes cannot be applied to the transfer of this restricted property because they contradict the restrictions.

(1) The tax itself is inconsistent with the restrictions since they take the transfer out of the taxing jurisdiction of the state. *The Kansas Indians,* 5 Wall. 737; *The New York Indians,* 5 Wall. 761; *United States* v. *Rickert,* 188 U. S. 432. These decisions have never been qualified and have uniformly been followed. The result is not a product of the so-called "instrumentality" doctrine, but rests upon the operation of the statutory restrictions. If, on the balance, an estate or in-

heritance tax should be imposed with respect to restricted lands, or to some part of them, this is a decision for Congress and not for the courts to make.

(2) The lien imposed by the state taxes is in conflict with the Federal restrictions. This Court has held that, even where the lien is accompanied by a provision forbidding foreclosure during Indian occupancy, it serves to invalidate the tax statute. *The New York Indians,* 5 Wall. 761. When Congress has permitted the taxation of restricted property, it has ordinarily taken pains that no tax lien should attach. This course of discriminating legislation heavily underscores the importance that, if restricted lands are to be subjected to taxation, this be done by legislative action rather than judicial innovation. Particularly since the tax, if upheld, would apparently cast a cloud and a threat of foreclosure upon all restricted property in excess of the statutory exemptions under state law owned by Indians in Oklahoma who have died since 1915, this Court should hesitate to grant the request of the State Tax Commission that it assume the legislative responsibilities of Congress.

(3) A number of the provisions of the Oklahoma tax statutes involve a command of the decedent's property which is wholly inconsistent with the Federal duties and responsibilities of the Secretary of the Interior and his repre-

sentatives who have both the control and the custody of the restricted property.

(4) Not only the state tax officials but, with an even greater degree of consistency, the Federal officials charged with the administration of Indian affairs have construed the restrictions, ever since 1908, as serving to exempt the restricted property from state taxation upon its transfer at death. This construction has been contemporaneous, long-continued, and known to Congress, and has been followed by frequent congressional adjustments of restrictions and tax exemptions which have left this long-standing administrative construction unchanged. Upon familiar principles, it must be taken to have received specific legislative sanction.

D. Much of the property involved in these cases is not only restricted but subject to a specific tax exemption. This specific exemption was not primarily designed to protect the lands against state taxation, since that protection was taken to be given by the restrictions. However, the exemptions are there, and, at the minimum, must be given effect by this Court. They speak in broad terms: "nontaxable" and "exempt from taxation." This broad exemption covers all forms of state taxation with respect to the lands. As this Court has frequently held, Indian exemptions, in contrast to the ordinary exemption which is carved out of a general taxing statute,

are to be construed broadly and in the sense with which the Indians must have understood them. So construed, they do not fall before the rule which this Court has announced as to ordinary tax exemptions which do not include estate or inheritance taxes unless specifically mentioned.

E. There is no theory which would serve to permit the state to tax the transfer of restricted property at death. (1) The transfer at death is not a state privilege sufficient to ground an otherwise forbidden tax. (2) The rule as to Federal estate taxation is inapplicable, since the restrictions were directed not against the United States but against third persons, whether an individual or a state. And, quite apart from the intended effect of the restrictions, Article VI of the Constitution would condemn a state qualification of the restrictions while it would not forbid a Federal qualification.

F. Finally, the decision below was compelled by the decision of this Court in *Childers* v. *Beaver*, 270 U. S. 555. (1) The case cannot be distinguished on any valid ground, since the restricted property of the Five Civilized Tribes is, in every respect mentioned by the opinion, on the same footing as that of the Quapaws. (2) The reasoning of the *Beaver* case, however, is not entirely satisfactory. But its result is entirely correct, and its reasoning may be sustained if its few enigmatic sentences be read to refer to the effect of the Federal restrictions.

ARGUMENT

This case does not, except in the very broadest sense, involve a question of intergovernmental tax immunity. We deal here, not with the broad implications of the Constitution and the federated form of Government, but with the cumulative impact of much history and many statutes relating to the members of the Five Civilized Tribes and their property. In this highly specialized field, which has been the subject of a great mass of minute legislation, it could scarcely be profitable to reason from distant analogies in the general, nonstatutory tax relations between the nation and the states. In the pages which follow there will, then, be no characterization of either the Indian or his property as a "Federal instrumentality." Attention will, instead, be directed to the specific statutes and the specific practice which forms the framework within which any question of Five Civilized Tribes taxation must be answered.

An answer drawn from scores of statutes and decades of history will be neither accurate nor comprehensible unless it be understood that it represents an amalgam of both practice and theory, and that the intended effect of the statutes must be gathered from the practice and the court decisions which preceded them. This brief will discuss, in the first of its two points,

the reach of the Oklahoma tax as a matter of state law. Our second point will show that the Federal restrictions upon the property involved in these cases serve by their nature to exclude any state taxation upon its transfer. In each point we shall be forced to present to this Court a fragmentary part of the extensive and unique history which forms the foundation of any inquiry into the specialized field of Indian law. This history is advanced not as a form of scholarly digression, but as an essential, and indeed the major, ingredient in an understanding of the issues presented by these cases.

I

The Inheritance Tax as a Matter of State Law Is Inapplicable to Restricted Property of a Member of the Five Civilized Tribes

The Supreme Court of Oklahoma has never passed directly upon the applicability as a matter of state law of the state inheritance and estate taxes to restricted property of members of the Five Civilized Tribes. We are convinced, however, that it is so plainly inapplicable under controlling statutes and decisions that this point must be brought to the support of the judgment of the court below before we present our main contention, that the tax cannot be applied without contradiction of Federal statutes.

A. THE STATE TAX STATUTES

1. *The taxes are laid on a transfer under state law.*—S. L. 1915, c. 162, section 1, which is applicable to the estates of Lucy Bemore and Nitey, provides:

> A tax is hereby laid upon the transfer to persons or corporations of property or any interest therein or income therefrom. * * *
>
> First: By will or the intestate laws of this state * * *.

The Supreme Court of Oklahoma has made it plain that the statute means just what it says, and that the tax laid by the inheritance law of 1915, as amended, is a price paid to the state for the privilege of transmitting property at death under state law. *McGannon* v. *State*,[20] 33 Okla. 145; *In re Estate of Harkness*, 83 Okla. 107; *In re Estate of Whitson*, 88 Okla. 197.

S. L. 1935, c. 66, article 5, section 1, which is applicable to the estate of Wosey Deere, provides:

> A tax is hereby levied upon the transfer of the net estate of every decedent * * * by will or the intestate laws of this state * * *.

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[20] The *McGannon* case arose under the first inheritance tax of Oklahoma, S. L. 1907–08, pp. 733–48, which was similarly levied "When the transfer is by will or by the intestate laws of this State."

The 1915 act was an inheritance tax on the legacies or distributive shares of the estate, and the 1935 act is an estate tax on the estate itself. It is wholly clear that transfers under these statutes are taxed only when they are transferred by the intestate laws of Oklahoma.

2. *The taxes are made liens upon the property passing at death.*—Section 8 of the 1915 act, as amended by S. L. 1919, c. 296, section 5, provides:

> Every such tax shall be and remain a lien upon the property transferred until paid, * * *.

Similarly, S. L. 1935, c. 66, article 5, section 9, provides:

> The taxes levied under this Act shall be and remain a lien upon all the property transferred until paid; * * *.

It is to be noted that the lien subsists until the taxes are paid. It is an elementary rule that, in the absence of an express statutory provision to the contrary, statutes of limitation do not run against the state. There is no provision in either the 1915 or 1935 act for establishing any periods of limitation. The general provisions governing delinquency in the payment of taxes which have been in force during the period of applicability of the 1915 and 1935 inheritance tax laws[21] made

[21] Compiled Oklahoma Statutes, 1921, section 9724; Oklahoma Statutes, 1931, section 12723; Oklahoma Statutes Annotated, 1941, title 68, section 353.

The Uniform Tax Procedure Act enacted by Oklahoma in 1939 does provide in section 24 that no tax may be assessed,

taxes upon real property "a perpetual lien," and taxes due upon personal property, a lien for a period of two years upon the real property of the delinquent taxpayer. Whether the general provisions or those of the inheritance laws govern, then, the lien at least as to real property remains until the tax is paid. If the inheritance tax is applicable to restricted Indian property there may be existing liens upon all such property included in the restricted estate of any Indian who has died, owning property in excess of the statutory exemptions under state law, since the passage of the 1915 act.[22]

Sections 28 and 29 of the Uniform Tax Procedure Act, which would be applicable to the collection of the inheritance taxes involved in this case, provide respectively for the issuance of tax certificates and tax warrants by the Oklahoma Tax Commission. These instruments when en-

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nor proceedings for collection instituted, after three years have elapsed since filing of a return, but this section expressly declares that it shall be "operative only in cases arising after the effective date of this act," and requires, in any event, that a return be filed.

[22] The act of May 26, 1908, Laws 1907–08, c. 81, p. 733, which was incorporated in the Revised Laws of 1910, as sections 7489–7523, was repealed by Laws 1941, p. 462, section 1, effective June 7, 1941, but none of the subsequent inheritance tax laws have been repealed. Section 26 of the 1935 act expressly preserved prior inheritance tax laws "where the decedent died prior to the effective date of this Act," and a similar provision was included in section 22 of the 1939 act (Laws 1939, p. 435), which superseded the 1935 act.

tered by the court clerk upon the district court judgment docket initiate a process of execution against delinquent estates, and create further liens against the estates "in addition to any and all other liens existing in favor of the State."

3. *The tax laws contain provisions controlling the administration of decedents' estates.*—These provisions are based upon the assumption that the administration of the estate is subject to the jurisdiction of the county court of the State.

The legal representative of a decedent is not entitled to a final order of discharge from the county court until he produces a receipt showing the payment of the inheritance or estate tax. (Section 8 of 1915 act, as amended; section 25 of 1935 act.)

The legal representative of a decedent is further authorized to sell any property of the estate if necessary to pay the tax. (Section 10 of 1915 act, as amended; section 9 of 1935 act.)

Section 8 of the 1935 act also authorizes the legal representative to borrow money to pay the tax, and to mortgage or pledge the assets of the estate to secure the loan.

Finally, it is provided in section 10 of the 1935 act that no banking institution may deliver securities or assets of an estate to the legal representative of a decedent without notifying the Oklahoma State Tax Commission, and retaining such an amount of this property as will be sufficient to pay the tax.

B. THE NATURE OF THE FIVE TRIBES PROBATE SYSTEM

The probate system applicable to the restricted property of members of the Five Civilized Tribes results from an intermingling of statutory provisions, judicial decisions, and years of operating practice. The resulting product is rather intricate, but an examination in some detail makes plain, we submit, that the State legislature cannot have intended that the state inheritance and estate taxes should apply.

Unless Congress has provided to the contrary, the descent and inheritance of Indian property, including lands allotted in severalty, has always been governed by tribal law. See *Jones* v. *Meehan*, 175 U. S. 1, 29.

As to land allotted under the General Allotment Act of February 8, 1887 (24 Stat. 388), Congress provided in section 5 that it should descend according to the law of the state in which the land was situated. The Secretary of the Interior, however, probates the allotted lands, both as a consequence of the restrictions forbidding transfer without his consent and pursuant to express statutory direction. *Taylor* v. *Parker*, 235 U. S. 42; act of June 25, 1910 (36 Stat. 855). His reliance upon state law, under section 5 of the General Allotment Act, is simply upon a convenient rule-book which has been provided by Congress, and "the lands really passed under a

law of the United States" and not under state law. *Childers* v. *Beaver*, 270 U. S. 555, 559.

The history of the Five Tribes probate system has been considerably more complicated. By the act of May 2, 1890 (26 Stat. 81, sec. 31), Congress put in force in the Indian Territory the Statutes of Arkansas contained in Mansfield's Digest of 1883, including the statutes relating to descent and distribution. This provision did not of itself serve to replace tribal law applicable to decedents of the Five Tribes, but the act of June 7, 1897 (30 Stat. 62, 83), provided that this territorial law should apply to "all persons therein, irrespective of race." For good measure, Congress by the act of June 28, 1898 (30 Stat. 495, secs. 26 and 28), also expressly terminated all the tribal laws and abolished the tribal courts. But then, in making the so-called Original Creek Agreement by the act of March 1, 1901 (31 Stat. 861), Congress revived the tribal law of descent and distribution and made it applicable to the Creek allotments. Again this provision was repealed by the act of June 30, 1902 (32 Stat. 500), confirming the Supplemental Creek Agreement, and the law of Mansfield's Digest was reinstated as the Creek law of descent and distribution, with the qualification that Creek heirs should take to the exclusion of others. Finally, by the act of April 28, 1904 (33 Stat. 573, sec. 2), it was declared that all the statutes of Arkansas theretofore put in force in the Indian

Territory should be taken to "embrace all persons and estates in said territory, whether Indian, freedmen, or otherwise."

When the State of Oklahoma, which was to be formed from the Territory of Oklahoma as well as the Indian Territory, was admitted into the Union, Congress provided in section 13 of the Enabling Act, in order to give the new state a uniform body of law, that "the laws in force in the Territory of Oklahoma as far as applicable, shall extend over and apply to said State until changed by the legislature thereof." The people of the State made the same provision in section 2 of Article 25 of their Constitution. As this Court stated, in *Jefferson* v. *Fink*, 247 U. S. 288, 293, when Oklahoma was admitted into the Union on November 16, 1907, "the laws of the Territory of Oklahoma relating to descent and distribution (Rev. Stats. Okla. 1903, c. 86, art. 4) became laws of the State. Thereafter Congress, by the Act of May 27, 1908, c. 199, 35 Stat. 312, § 9, recognized and treated 'the laws of descent and distribution of the State of Oklahoma' as applicable to the lands allotted to members of the Five Civilized Tribes."[23]

[23] Until the act of May 27, 1908, the Arkansas statutes would still have governed the descent of property of members of the Five Civilized Tribes. Speaking of the section of the Enabling Act which made the law of the Territory of Oklahoma the law of the State of Oklahoma, this Court said in *Sperry Oil Co.* v. *Chisholm*, 264 U. S. 488, 496–7: "Mani-

The present system of probating the estates of deceased members of the Five Tribes is entirely a product of congressional legislation. In fact, the right of making wills that is possessed by full-blood members of the Five Tribes today is based upon section 23 of the act of April 26, 1906 (34 Stat. 137), as amended by section 8 of the act of May 27, 1908 (35 Stat. 312), which sanctioned the making of wills except that no will of a full-blood Indian devising real estate away from his kindred could be made without court approval. These still remain the two basic statutes relating to the property of the Five Civilized Tribes.

The state courts, however, do not function as true probate courts as to restricted property; indeed, until 1918 they could not make a determination of heirship that would be good against all the world but could only incidentally determine such a question in suits between parties over whom they had jurisdiction. *State* v. *Huser*, 76 Okla. 130; *State* v. *Wilcox*, 75 Okla. 158. However, by the act of June 14, 1918 (40 Stat. 606), provision was made for a conclusive determina-

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festly this provision related only to the statutes affecting the citizens of the state generally and was not intended to authorize the application of such laws in contravention of the acts passed by Congress in reference to the property of Indians under the power expressly reserved in the Enabling Act itself." See also, *Jackson* v. *Harris*, 43 F. (2d) 513, 516 (C. C. A. 10).

tion of heirship by the probate courts of Oklahoma upon the death of restricted members of the Five Tribes.

This act made the heirship determination binding but by no means conferred a general probate jurisdiction. A proceeding under the 1918 act does not try and determine title, nor do the assets of the estate pass to the administrator, nor can they be sold to meet the debts of the decedent; the only jurisdiction of the court is to establish the fact of heirship. *Cowokochee* v. *Chapman et al.*, 90 Okla. 121, cert. den. 263 U. S. 713, error dismissed 267 U. S. 572; *Wolf et al.* v. *Gills*, 96 Okla. 6; *Eastern Oil Co.* v. *Harjo*, 57 Okla. 676; *Redwine* v. *Ansley*, 32 Okla. 317; *Anderson* v. *Peck*, 53 F. (2d) 257 (C. C. A. 10); *Darks* v. *Ickes*, 69 F. (2d) 231 (App. D. C.); *Pfister* v. *Johnson et al.*, 13 Fed. Supp. 662 (N. D. Okla.). Despite the 1918 act the Federal district courts in Oklahoma retain concurrent jurisdiction to determine heirs. *McDougal* v. *Black Panther Oil and Gas Co.*, 273 Fed. 113 (C. C. A. 8); *Anderson* v. *Peck, supra.*

It has often been held that the Oklahoma courts act as Federal administrative agencies in determining the heirs of members of the Five Civilized Tribes. *State* v. *Wilcox*, 75 Okla. 158; *State* v. *Huser*, 76 Okla. 130; *Homer* v. *Lester*, 95 Okla. 284; *In re Fulsom's Estate*, 141 Okla. 300; *March* v. *Peter*, 179 Okla. 207; *In re Jessie's Heirs*, 259

Fed. 694 (E. D. Okla.). The Supreme Court of Oklahoma, indeed, has held that, as long as lands of the Five Tribes are restricted, they are not "within the jurisdiction of the probate courts of the state." *Jefferson* v. *Winkler,* 26 Okla. 653. In *Letts* v. *Letts,* 73 Okla. 313, the same court declared that "the alienation of an Indian allotment being governed by the act of Congress, the right of an Indian to devise the same must be governed and controlled entirely by the act of Congress pertaining thereto * * *."[24]

Indeed, the Secretary of the Interior and the Superintendent of the Five Civilized Tribes,

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[24] The Oklahoma courts play a similar role under section 9 of the act of May 27, 1908 (35 Stat. 312), which requires approval of conveyances of full-blood heirs by "the court having jurisdiction of the settlement of the estate of the deceased allottee." The state courts act as federal agencies in this regard. *Parker* v. *Richard*, 250 U. S. 235, 239; *Lasiter* v. *Ferguson*, 79 Okla. 200; *Haddock* v. *Johnson*, 80 Okla. 250; *Malone* v. *Wamsley*, 80 Okla. 181; *Snell* v. *Canard*, 95 Okla. 145, error dism. 267 U. S. 578; *Carey* v. *Bewley*, 101 Okla. 235; *Thompson* v. *Smith*, 102 Okla. 150; *Tiger* v. *Lozier*, 124 Okla. 260, *cert. den.*, 275 U. S. 496. The function is administrative and ministerial rather than strictly judicial in character and it is immaterial that the county court in approving a deed has not observed the procedural requirements and formalities required by Oklahoma law. *Cochran* v. *Blanck*, 53 Okla. 317; *Campbell* v. *Dick*, 157 Pac. 1062; *Homer* v. *Lester*, 95 Okla. 284; *Miller* v. *Gregory*, 132 Okla. 48; *Coats* v. *Riley*, 154 Okla. 291. Chapter 198 of the Oklahoma laws of 1918 regulating procedure, was held not to be mandatory, since the county court, acting as a Federal agency could not be subjected to state law. *Malone* v. *Wamsley*, *supra; Harrison* v. *Reed*, 97 Okla. 254; *Fisher* v. *Grider*, 109 Okla. 23.

despite the authority Congress has delegated to the probate courts of Oklahoma, still play a most important role in the administration of the restricted estates. Under the act of April 12, 1926 (44 Stat. 239), all papers in proceedings to determine heirs must be served upon the Superintendent, and if there is reason to suppose that the interests of a restricted Indian or his property will be adversely affected, the Government may remove the case within twenty days to the Federal District Courts. By section 8 of the act of January 27, 1933 (47 Stat. 777), the duty of representing any restricted Indian of the Five Tribes before the Oklahoma county or appellate courts was imposed upon probate attorneys appointed by the Secretary of the Interior under the act of May 27, 1908. By reason of his control of restricted property and his custody of the restricted funds of members of the Five Civilized Tribes of one-half or more Indian blood the Secretary of the Interior has ultimate control of all the financial aspects of the administration of estates of deceased members of the Five Civilized Tribes. The payment of the decedent's debts, of the costs of administration, of attorneys' fees, and the distribution of the financial assets of the estate, all require the discretionary approval of the Secretary of the Interior. Finally, the act of December 24, 1942 (Public Law 833, 77th Cong.) has conferred exclusive jurisdiction upon the Secretary of the Interior to probate

the restricted estates of deceased members of the Five Civilized Tribes when these consist entirely of funds or securities of an aggregate value not in excess of $2,500.

The administration of the restricted estates of the members of the Five Tribes is thus of a dual character. Some functions have been delegated to the Oklahoma courts, while others have been retained by the Federal Government. The retained powers are fully as significant as the delegated, and include custody and administration of the estate and allowance of claims against the restricted property. And it is entirely clear that the Oklahoma courts, equally with the Federal officials, derive their powers only from acts of Congress and that the entire process of transfer of restricted property at death is a Federal not a state function. The state courts have frequently and emphatically recognized that the law governing the transfer and the machinery through which it is accomplished is Federal and not state.

C. THE TAXES ARE INAPPLICABLE UNDER STATE LAW

We shall here measure the state inheritance and estate taxes against the Five Tribes probate system and show that the state legislature could not have intended them to apply to the transfer at death of restricted property.

1. *The Transfer Is Not Under State Law.*—We have shown above that the 1915 act in its entirety,

and the 1935 act at least as to intestacy, applies only when the transfer at death is the result of, or the privilege is conferred by, state law (*supra*, pp. 24–25). We have shown that the Oklahoma courts themselves recognize that the transfer at death of restricted property of a member of the Five Tribes is outside the jurisdiction of the state and is accomplished under Federal not state law (*supra*, pp. 32–33). It follows that the tax is inapplicable by the terms of the state statutes. It is, in this connection, immaterial that, after the transfer, the property becomes unrestricted. *Childers* v. *Pope*, 119 Okla. 300.

2. *The Statutory Mechanics Are Inapplicable.* It is rudimentary, as we show below (pp. 48–66) that restricted Indian property is immune from encumbrances and liens of all nature. Yet the inheritance and estate taxes involved in these cases purport to place a perpetual lien upon all transferred property to secure payment of the tax (*supra* pp. 25–27). It is unlikely in the extreme that the Oklahoma legislature would have thought its taxes, so enforced, to be applicable to restricted property which could not be included within its collection system.

This conclusion is reinforced by the numerous administrative features which have been detailed above (pp. 27–28) and which assume that the state court has full jurisdiction of the property, full control over the legal representative of the de-

cedent and full authority to sell or dispose of the decedent's property. In point of fact, neither of these conditions obtain with respect to restricted Indian property. As we have shown, the state court has no general probate jurisdiction, cannot control the restricted property, cannot control the Secretary of the Interior who has its custody, and has authority to determine only the persons who may present their claims to the Secretary (*supra*, pp. 32–35). It cannot be supposed that the state legislature intended to apply the taxes in cases where so many of the adminstrative provisions would be vain.

3. *The Practical Construction Has Been Confirmed.*—We discuss the administrative practice as it bears on the intention of Congress at a later point (pp. 85–87). But it is equally applicable to the Oklahoma legislature.

The first inheritance tax was enacted by the Oklahoma legislature in 1908. S. L. 1907–1908, secs. 7712–7715, pp. 733–734. For a period of 30 years the state officials made no effort to collect a tax upon the transfer at death of restricted property of members of the Five Civilized Tribes.[28] There was an abortive effort in 1924 to collect the inheritance tax upon the transfer

[28] Even in 1934 when a determined effort was made to collect delinquent taxes in order to aid depleted state revenues (Oklahoma Tax Commission, Report 1931–1934, pp. 40–41), no effort was made to tax the transfer of this restricted property.

of Osage and Quapaw property. In 1926, this Court in *Childers* v. *Beaver*, 270 U. S. 555, held the tax invalid as applied to restricted Quapaw property, and the Oklahoma Supreme Court in *Childers* v. *Pope*, 119 Okla. 300, held it invalid as applied to restricted Osage property. Even during this 2-year period, for reasons not evident here, there was no effort to tax restricted Five Tribes property. After 1926 the state officials returned to their former practice of not assessing taxes upon the transfer of any restricted property.[26]

On May 6, 1938, special counsel for the State of Oklahoma,[27] appeared before the Senate Committee on Indian Affairs, holding hearings on S. Res. 168, 75th Cong., 3d sess., authorizing an investigation of the alleged loss of state revenues because of Indian tax exemptions. He said (p. 10):

> Incidentally, I wish to call your attention to the fact that inheritances of restricted Indian estates are likewise exempt from the State inheritance or estates tax.

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[26] Some time in 1938 the state tax officials, in reflection of the view of the Federal tax officials that the Federal estate tax is applicable to restricted property, commenced the present effort to collect the state tax. We show below (pp. 93-95) that the Federal tax stands on a quite different basis.

[27] He was Clifford W. King, for 12 years Assistant Attorney General in charge of tax litigation, and for 5 years attorney for the Oklahoma Tax Commission. Hearings, p. 4.

The Oklahoma inheritance or estate taxes have been enacted in 1908, 1915, and 1935. Both in 1915 and in 1935 there was a settled practice and understanding that the taxes were inapplicable to restricted Indian property. Yet on neither occasion did the state legislature revise the language to impose the tax on such property. On familiar principles, the reenactment must be taken to be a legislative recognition and acceptance of the administrative practice.[28] *Taft* v. *Commissioner,* 304 U. S. 351, 357; *Great Northern Ry. Co.* v. *United States,* 315 U. S. 262, 275–276.

In 1935, it is true, the reenactment followed, by 10 years, an unsuccessful attempt to impose the tax on Quapaw and Osage property, which had failed because of judicial decisions which held or implied that there was a want of power in the state to impose the tax. *Childers* v. *Beaver,* 270 U. S. 555; *Childers* v. *Pope,* 119 Okla. 300. But this, even if the Court were to overrule those decisions, does not weaken the force of the reenactment. (a) The 1915 reenactment has no such qualification of its weight. (b) The legislature, by retaining the requirement that the taxable property pass under state law and the inapplicable administrative features, has accepted or at

[28] We see no reason why the "reenactment doctrine" is not as fully applicable to a state legislature as to Congress. *Cf. Copper Queen Consolidated Mining Co.* v. *Territorial Board of Equalization,* 206 U. S. 474.

least has not afforded a challenge to the constitutional doctrine. See *Parker* v. *Motor Boat Sales,* 314 U. S. 244, 250; *cf. Davis* v. *Department of Labor and Industries,* No. 86, this Term.

II

The State Is Without Power to Impose a Tax Upon the Transfer of Restricted Property of Members of the Five Civilized Tribes

We urge in this point that the restrictions imposed by Federal law upon the transfer of restricted property of the members of the Five Civilized Tribes forbid the imposition of the state inheritance and estate taxes. The nature and the scope of Federal restrictions upon Indian property are matters which have, in most aspects, long since been settled by the decisions of this Court. But those decisions cannot easily be understood, and the scope of the statutes cannot easily be grasped, unless placed in the context of the somewhat specialized field of Indian law. The following pages, therefore, discuss (a) the historical policy of Congress with reference to Indian tax exemptions, (b) the scope of the restrictions upon the transfer of property, and (c) their operation to condemn the inheritance and estate taxes presented in these cases. There follows a briefer discussion of (d) the statutory tax exemptions found in these cases, (e) two collateral arguments which the state might advance in order to

justify the tax, and (f) the decision of this Court in *Childers* v. *Beaver*, 275 U. S. 555.

A. THE POLICY OF CONGRESS AS TO INDIAN TAX EXEMPTIONS

The Congressional attitude towards Indian tax exemption may be roughly marked by three stages.

Down to the Civil War and for a few years thereafter, the Federal Government meticulously guarded the Indians against all forms of state taxation. This was not a one-sided policy. Instead of attempting the impossible task of determining where the balance of advantage lay in the contributions made by the Indians to the states and vice versa, Congress adopted the policy that, generally speaking, the states would receive free such Indian lands as they needed, and that the Indians would receive free such governmental services as they needed. In both cases the Federal Government paid the bill. This policy, buttressed by the plighted word of the United States in hundreds of treaties, was given an entirely sympathetic application by the courts.[29]

After the Civil War, however, and particularly with the General Allotment Act of 1887, Congress

[29] *Kansas Indians*, 5 Wall. 737; *New York Indians*, 5 Wall. 761; *United States* v. *Rickert*, 188 U. S. 432; *United States* v. *Thurston County*, 143 Fed. 287 (C. C. A. 8); *Dewey County, S. D.* v. *United States*, 26 F. (2d) 434 (C. C. A. 8), cert. den., 278 U. S. 649. And *cf. New Jersey* v. *Wilson*, 7 Cranch 164.

embraced a contrary policy, a policy which had as its object the individualization of Indian lands and the assimilation of Indian land tenures and political relationships to those of the Indians' white neighbors. An essential element of this policy was the subjecting of Indian lands to state taxation. Much of the legislation enacted by Congress from 1887 to 1928 is directed to the subjecting of Indian lands to state control and state taxes.[30] Sympathy with this policy is shown in a number of Supreme Court decisions, and most notably in Justice Brandeis' opinion in *McCurdy* v. *United States,* 246 U. S. 263, 269, rendered in 1918, when this policy stood unchallenged.

After 50 years of trial, however, there was a general consensus that the policy of subjecting Indians and their lands to state control had proved a failure.[31] Two-thirds of the lands possessed by Indians in 1887 had slipped out of Indian ownership. State taxation had proved a major cause of Indian landlessness, whether operating directly through tax sales or indirectly through the compulsion by which the need to meet tax payments led to mortgage and sale of the taxed land.[32] An

[30] See Cohen, *Handbook of Federal Indian Law*, 78–83.

[31] *Op. cit.*, p. 84. And see the series of hearings before the Subcommittee of the Senate Committee on Indian Affairs, beginning Nov. 12, 1928 (70th Cond., 2d sess), and extending down to the enactment of the act of June 18, 1934, 38 Stat. 984.

[32] *Ibid.* And see Meriam, *The Problem of Indian Administration* (1928), 477; Debo, *And Still the Waters Run* (1940).

increasing number of Indians, traditionally and economically dependent upon the land but rendered landless by the new policy, constituted an economic burden upon their neighbors and a stigma upon the national honor. Recognizing these evils, Congress, at the beginning of the last decade adopted a policy, which it has from time to time developed and strengthened, of increasing the exemptions and safeguards given to Indians against state taxation. The first statute in more than half a century which extended exemptions to property theretofore taxable is the act of March 2, 1931, 46 Stat. 1471, providing that where nontaxable land of a restricted Indian of the Five Civilized Tribes is sold, the Secretary of the Interior may reinvest the proceeds in other land, which also will be nontaxable and restricted from alienation. At least half a dozen subsequent statutes have expanded the field of Indian tax exemption.[33] This trend is particularly notable at a time when the general policy of Congress outside the Indian field was to decrease and eliminate tax exemption.

The new policy chosen by Congress was not the result of accident; it represented the fruit of careful deliberation. A series of Congressional investigations was carried out on the problem of Indian taxation. In 1933 the following con-

[33] The act of June 30, 1932, extends the provisions of the act of March 2, 1931, to all Indians. The act of Jan. 27, 1933, 47 Stat. 777, provided for tax exemption of lands ac-

clusions were presented, which have since been generally accepted and carried out by Congress:

> * * * As hereinafter indicated in this report, the subcommittee is unanimous in its opinion that the Indian is not yet ready to bear the burden of taxation which is normally borne by the citizens of the Republic, and this view is supported by all the testimony and information received by the subcommittee. Inasmuch as the Indian land bears no tax revenue and in many areas will not for an indefinite time in the future contribute to the cost of government it becomes imperative for the Federal Government to perform its duty by assuming its full responsibility in educating the Indian children. The subcommittee concurs in the views expressed by certain witnesses who testified at the hearing that the duty of preparing the Indian population for citizenship is a national responsibility and that it ought not to be imposed upon

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quired "by inheritance, devise, gift, or purchase, with restricted funds, by or for restricted Indians" of the Five Civilized Tribes where the lands were theretofore tax-exempt. The act of June 18, 1934, 48 Stat. 984, extended in this respect to Oklahoma by the act of June 26, 1936, 49 Stat. 1967, provides for tax exemption of Indian lands formerly subject to taxation where such lands are conveyed to the United States to be held in trust for Indians. The act of June 20, 1936, 49 Stat. 1542, as amended by the act of May 19, 1937, 50 Stat. 188, likewise provides for the removal of Indian lands in specified amounts from local tax rolls. There have also been a number of statutes appropriating money in aid of Indians who have been compelled to pay state taxes.

> the counties and local school districts charged with the operation of the local public schools. Incidentally, the subcommittee believes that many of the problems of Indian education will be solved almost instantly if the subordinate political organizations, who are now dealing direct with the Indians, are given to understand that their efforts are appreciated and that the Government of the United States will cooperate in a substantial way by paying the entire out-of-pocket cost of preparing the Indians for citizenship. Nothing else will so quickly silence the demand for the right to tax the Indians' land. ["Tax exempt Indian Lands," Report of the Subcommittee of the Senate Committee on Indian Affairs, 72d Cong., 2d sess., February, 1933, p. 11.]

Thus, instead of seeking to abolish or curtail Indian tax exemptions, the proposal was made that the local governments adversely affected by such tax exemptions should receive adequate compensation in the form of federal grants. In accordance with the recommendations of the Senate subcommittee (*op. cit.*, pp. 22–23), the Johnson-O'Malley Act of April 16, 1934 (48 Stat. 596), amended by act of June 4, 1936 (49 Stat. 1458, 25 U. S. C., secs. 452–456), laid a framework for Federal contributions towards state services rendered to Indians, and a series of specific statutes authorized concrete contribu ons to local authorities, by way of

compensation for services rendered to tax-exempt Indians.[34] Federal appropriations are now used to a considerable extent to compensate local authorities for governmental services rendered to nonta ving Indians.[35] At the same time the Federal overnment has been empowered by recent legislation to secure reimbursement from the Indians benefited by services rendered.[36] Thus the present policy of Congress is to compel the states to look to the Federal Government for compensation for governmental services rendered to Indians with tax-exempt property, and to retain under Federal control the levying of such charges as may seem proper against these Indians.

It may be noted that the shifting policies of Congress on the subject of state taxation have roughly corresponded to three stages in the general Fed-

[34] See, Cohen, *Handbook of Federal Indian Law*, p. 241, and, especially, the numerous statutes of this type cited in footnote 46.

[35] The computations of the Oklahoma tax officials indicate that the exemptions of restricted lands from ad valorem taxation have deprived the state and its counties of tax revenues which amounted to $4,482,938 in 1908 and had declined to $593,904 in 1937. Hearings on S. Res. 168, 75th Cong., 3d sess., p. 30. In contrast, the United States paid, in the fiscal year 1942, $472,351 directly to Oklahoma and its subdivisions for Indian health and education and, in addition, made expenditures of $1,917,959 for Indian health and education in Oklahoma, a total of $2,390,310, under authority of the Interior Department Appropriation Act for 1942 (55 Stat. 303, 320–324).

[36] Act of May 9, 1938, sec. 1, 52 Stat. 312, 313; act of May 10, 1939, sec. 1, 53 Stat. 707, 708; act of June 18, 1940, sec. 1, 54 Stat. 427; act of June 28, 1941, sec. 1, 55 Stat. 325; act of July 2, 1942, sec. 1, 56 Stat. 525; 25 U. S. C. A. 561, 562.

eral policy towards the relations of tribal Indians to the states: the original policy of respect for tribal autonomy, which extended throughout the treaty period, ending in 1871; the subsequent policy of suppressing tribal governments and tribal institutions and subjecting Indians to state control; and, finally, the policy which has prevailed since the beginning of the past decade, of encouraging tribal government, preventing the further individualization of tribal estates and limiting state control over Indian property.[37] Under the present policy of Congress many Indian tribes and communities, including portions of the original Creek Nation, have reestablished local governments, many of which are now exercising powers of taxation over their members.[38]

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[37] Discretionary authority to extend periods of restriction had been conferred upon the President by the act of June 21, 1906, 34 Stat. 325, 326, 25 U. S. C., sec. 391. Restrictions were extended generally "until otherwise provided by Congress" by section 2 of the act of June 18, 1934, 48 Stat. 984, 25 U. S. C., sec. 462. The acts of February 26, 1927, 44 Stat. 1247, and February 21, 1931, 46 Stat. 1205, authorized the cancelation of fee patents issued without Indian consent, thus effecting a restoration of restricted status. The allotment of tribal lands was forbidden by section 1 of the 1934 act (25 U. S. C., sec. 461), but in fact allotment had been abandoned, administratively, some years earlier. The same act makes provision for the reestablishment and protection of tribal property and tribal powers. (25 U. S. C., secs. 477–478.) These latter provisions were originally inapplicable to Oklahoma tribes (25 U. S. C., sec. 473), but were substantially extended to such tribes by section 3 of the act of June 26, 1936, 49 Stat. 1967, 25 U. S. C., sec. 503.

[38] See Cohen, *op. cit.* 129, 455, 271, 142–143.

B. THE NATURE OF THE FEDERAL RESTRICTIONS

1. *The Origin and Function of Restrictions on Indian Lands.*—The significance of current restrictions on the transfer of Indian property may be illuminated by a brief glance at the historical development of such restrictions.[39] As Chief Justice Marshall pointed out, with a wealth of learning, in *Johnson* v. *McIntosh,* 8 Wheat. 543, and *Worcester* v. *Georgia,* 6 Pet. 515, each of the great European powers establishing settlements in the New World claimed an exclusive right, even as against its own citizens, to acquire land from the Indians in possession. These claims, validated by the sword and by international agreement, were written into the statutes and royal decrees of Great Britain and Spain long before the birth of this Nation.[40] The treaties of the United States followed and strengthened these precedents.[41]

The first Indian Trade and Intercourse Act, the act of July 22, 1790 (1 Stat. 137), established

[39] The term "restricted land" is, strictly speaking, a misnomer. Restrictions do not attach to the land itself nor even to the Indian owners as such; rather, they attach to the transfer of land, whether that transfer be accomplished by voluntary act of the owner or in some other fashion.

[40] See *Johnson* v. *McIntosh,* 8 Wheat. 543, 587–589; *Worcester* v. *Georgia,* 6 Pet. 515, 543–545; *Chouteau* v. *Molony,* 16 How. 203, 239.

[41] The first treaty ratified by the United States after the adoption of the Constitution, the treaty of January 9, 1789,

the complete and exclusive control of the Federal Government over the purchase of Indian lands, individual as well as tribal. In 1793 the language of the statute was broadened so as to make it clear that Federal control restrained grants to States as well as private purchases.[42] In 1796 the language of the statutory restriction on Indian land conveyances was further broadened to cover "purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto", and this restriction has remained as the keystone of Indian land law to this day (25 U. S. C. sec. 177).[43]

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with the "Wiandot, Delaware, Ottawa, Chippewa, Pattawatima, and Sac Nations" (7 Stat. 28), expressly declared that, "the said Nations, or either of them, shall not be at liberty to sell or dispose of the same [lands], or any part thereof, to any sovereign power, except the United States; nor to the subjects or citizens of any other sovereign power, nor to the subjects or citizens of the United States." (Art. 3.) The restriction thus imposed upon the transfer of Indian lands appears in one form or another in many other treaties, including some entered into prior to the adoption of the Constitution. See *Handbook of Federal Indian Law*, p. 41. In substance, it appears also in Article 2 of the treaty of August 7, 1790 (7 Stat. 35), with the Creek Nation (including the "Semanolies," then regarded as part of the Creek Nation): "The said Creek Nation will not hold any treaty with an individual State or with individuals of any State."

[42] Indian Trade and Intercourse Act of March 1, 1793, sec. 8, 1 Stat. 329, 330.

[43] Indian Trade and Intercourse Act of March 3, 1799, sec. 12, 1 Stat. 743.

The protection thus afforded was broadly conceived and broadly applied.[44] It did not depend upon the character of the title and applied equally where land was held in fee simple as where held by the United States in trust for Indian beneficiaries.[45] It extended to involuntary land transfers as well as to voluntary transfers.[46] It extended to transfers or trespasses ordered by State courts or other State officials as well as to those

[44] Until 1834 alienation of individual Indian lands could be effected only by treaty, under the Indian Intercourse Acts. Thereafter alienation of such lands was controlled by special and general allotment acts. Commenting on the policy involved, the court declared, in *Goodell* v. *Jackson*, 20 Johns. 693:

"Thus, in the resolution of congress of *January*, 1776, regulating trade with the *Indians*, it was declared, that no person should be permitted to trade with them without license, and that the traders should take no unjust advantage of *their distress and intemperance*. In a speech, on behalf of Congress, to the six nations, in *April* 1776, it was said to them, that congress were determined to cultivate peace and friendship with them, and prevent the white people from *wronging them in any manner, or taking their lands*. That congress wished to afford protection to all their brothers the *Indians*, who lived with them on this great island, and that the white people should not be suffered, by *force or fraud, to deprive them of any of their lands*. And in *November*, 1779, when congress were discussing the conditions of peace to be allowed to the six nations, they resolved, that one condition should be, that no land should be sold or ceded *by any of the said Indians*, either *as individuals*, or as a nation, unless by consent of congress (p. 723)."

[45] *United States* v. *Candelaria*, 271 U. S. 432.

[46] *The Kansas Indians*, *supra*; *The New York Indians*, *supra*. *Accord*: *Mullen* v. *Simmons*, 234 U. S. 132 (allotment); *Goudy* v. *Meath*, 203 U. S. 146 (allotment).

of a private character."[47] It extended to tax sales and tax liens as well as to other attempted interferences by State governments with the exclusive control of the Federal Government over the subject of Indian land transfers.[48] Indeed, as a matter of historical fact, the Indians were very much more concerned about the attempts of State officials to interfere with the possession and transfer of their lands than they were with the efforts of private individuals to stimulate voluntary land transfers. For typically private individuals entering upon Indian lands were "out of the protection of the United States" and the tribes concerned were authorized, by a series of treaties, to "punish him or them in such manner as they see fit."[49] Officials of the States, however, could be treated with disrespect only at the risk of war.[50]

The fact that restrictions against land transfer were drafted primarily to protect the Indians

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[47] *Worcester* v. *Georgia*, *supra*; *The Kansas Indians*, *supra*; *The New York Indians*, *supra*; 1 Op. Atty. Gen. 465.

[48] *The Kansas Indians*, *supra*; *The New York Indians*, *supra*. *Accord*: *United States* v. *Rickert*, 188 U. S. 432 (allotment).

[49] See Article 9 of the treaty of January 9, 1789 (7 Stat. 28, 30), and other treaties to the same effect cited in *Handbook of Federal Indian Law*, at p. 6, footnote 48.

[50] War between the Creek Nation and the State of Georgia existed in 1789. President Washington requested the advice of the Senate as to whether the United States should issue an ultimatum requiring the Creek Nation to cede lands to Georgia. The Senate advised against such action. The two Creek Treaties of 1790 were then executed. See Cohen, *op. cit.* 50.

from state officials stands out with particular clarity in the history of the Creek and Seminole Indians. This exclusive control of property relations by the Federal Government is expressed or implied in twenty-four treaties,[51] made in the period from 1790 to 1866, the force of most of which has never been abrogated. It was assured by the terms of the first treaty between the United States and the Creek Nation (then including the Seminoles) in 1790 (*supra*, p. 49). But despite this agreement the states in which the Creek lands were situated defied Federal authority and attempted to subject Creek property to state control. After years of inadequate protection against unconstitutional infringements upon its

[51] Twenty treaties were made with the Creek Nation, many of which include the Seminoles. Treaty of August 7, 1790, 7 Stat. 35; unpublished Treaty of August 7, 1790, Archives No. 17; Treaty of June 29, 1796, 7 Stat. 56; Treaty of June 16, 1802, 7 Stat. 68; Treaty of November 14, 1805, 7 Stat. 96; Treaty of August 9, 1814, 7 Stat. 120; Treaty of January 22, 1818, 7 Stat. 171; Treaty of January 8, 1821, 7 Stat. 215; Treaty of January 8, 1821, 7 Stat. 217; Treaty of February 12, 1825, 7 Stat. 237; Treaty of January 24, 1826, 7 Stat. 286; Treaty of March 31, 1826, 7 Stat. 289; Treaty of November 15, 1827, 7 Stat. 307; Treaty of March 24, 1832, 7 Stat. 366; Treaty of February 14, 1833, 7 Stat. 417; Treaty of November 23, 1838, 7 Stat. 574; Treaty of January 4, 1845, 9 Stat. 821; Treaty of June 13, 1854, 11 Stat. 599; Treaty of August 7, 1856, 11 Stat. 699; Treaty of June 14, 1866, 14 Stat. 785. Four additional separate treaties were made with the Seminoles. Treaty of May 9, 1832, 7 Stat. 368; Treaty of March 28, 1833, 7 Stat. 423; Treaty of June 18, 1833, 7 Stat. 427; Treaty of March 21, 1866, 14 Stat. 755.

powers,[52] the Federal Government proposed migration west of the Mississippi where the Indians would never be subject to the control of any state.

By the act of May 28, 1830 (4 Stat. 411), Congress authorized the President to pledge the faith of the United States that the lands granted to the migrating tribes (including the Creeks and Seminoles) would be secured to them forever.[53] The Creeks were skeptical as to whether the United States would afford in the West the protection it had not given in the East and their chiefs memorialized Congress in 1832 in these words (H. Doc. No. 102, 22d Cong., 1st sess., p. 3):

> We are assured that, beyond the Mississippi, we shall be exempted from further exaction; that no State authority can there reach us; that we shall be secure and happy in these distant abodes. Can we obtain, or can our white brethren give assurance more distinct and positive, than those we have already received and trusted? Can their power exempt us from intrusion in our promised borders, if they are incompetent to our protection where we are?

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[52] It may be noted that the decree of this Court in *Worcester* v. *Georgia*, 6 Pet. 515, was never carried out by the State of Georgia. See *Handbook of Federal Indian Law* 123.

[53] This pledge took the form of patents issued to the Creeks on August 7, 1852, and to the Seminoles on August 28, 1856. (See H. R. Rept. No. 593, 55th Cong., 2d sess., p. 2.)

It is against this background that we must read the Treaty of March 24, 1832 (7 Stat. 366), which in Article XIV provided:

> The Creek country west of the Mississippi shall be solemnly guaranteed to the Creek Indians, nor shall any State or Territory ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves, so far as may be compatible with the general jurisdiction which Congress may think proper to exercise over them.

Many years after the removal had been accomplished, a new treaty with the Creeks and the Seminoles reaffirmed this basic guaranty. Article IV of the Treaty of August 7, 1856 (11 Stat. 699). When the treaties were renegotiated after the Civil War there was no qualification of this broad freedom from state control.[54] The Curtis Act (30 Stat. 495) and the acts embodying the allotment agreements (act of July 1, 1898, 30 Stat. 567; March 1, 1901, 31 Stat. 861; June 30, 1902, 32 Stat. 500) made sweeping alterations in the relations between the tribes and the white

[54] The Seminole Treaty of March 21, 1866, 14 Stat. 755, in Article IX, reaffirmed all prior treaty obligations, while Article XI declared that inconsistent provisions of prior treaties were annulled, nothing in the 1866 treaty was inconsistent with freedom from state control. Article VII agreed to Federal, not state, control. The Creek Treaty of June 14, 1866, 14 Stat. 785, was to the same effect; See Articles X, XII, XIV.

governments. But even here they were careful to provide that nothing should affect existing treaties except so far as they were inconsistent (30 Stat. at 569; 31 Stat. at 872; see 32 Stat. at 505).

The issue, then, becomes an inquiry into the extent to which these treaty promises have survived the break-up of tribal lands and their allotment in severalty.

The theory of the allotment acts, and notably the General Allotment Act (24 Stat. 388), was that the Indian would receive in exchange for an undivided interest in tribal lands a definite parcel of such lands, but that until he reached an advanced state of financial competence (an event generally thought likely to occur after 25 years) the land allotted to him would be restricted just as it had been prior to allotment. The Indian surrendered tribal land, protected, then as now, against all forms of state taxation as well as against all other forms of encumbrance and alienation. What he received in exchange was to have the same measure of protection, at least for a temporary period.

These promises of protection have always been construed by this Court in a broad and generous spirit. The United States is capable of maintaining suits to set aside conveyances by Indian allottees in disregard of the restrictions. *Tiger* v. *Western Investment Co.*, 221 U. S. 286; *Heckman* v. *United States*, 224 U. S. 413; *United States*

v. *New Orleans Pacific Ry. Co.*, 248 U. S. 507; *United States* v. *Osage County*, 251 U. S. 128; *United States* v. *Candelaria*, 271 U. S. 432. It is not concluded in such a suit by a prior judgment between the parties. *Privett* v. *United States*, 256 U. S. 201. No rule of property will avail to defeat the restrictions. *Gannon* v. *Johnston*, 243 U. S. 108. The restrictions extend to every form of alienation, involuntary as well as voluntary. *Goudy* v. *Meath*, 203 U. S. 146. The restrictions extend to lease and mortgage as well as sale. *Mullen* v. *Simmons*, 234 U. S. 192; *United States* v. *First National Bank of Yakima, Washington*, 282 Fed. 330 (E. D. Wash.) The good faith of a purchaser from an Indian allottee makes no difference. *United States* v. *Brown*, 8 F. (2d) 564 (C. C. A. 8), *cert. den.*, 270 U. S. 644. He is not even entitled to the return of the consideration as a condition to the cancelation of the deed at the suit of the United States. *Heckman* v. *United States*, *supra*; *United States* v. *Walters*, 17 F. (2) 116 (D. Minn.). The restriction against alienation extends to disposition by will. *Taylor* v. *Parker*, 235 U. S. 42.[55]

[55] The element of Federal guardianship in the maintenance of the restrictions is indicated by the decisions which have held that Congress may extend the periods of restriction, and even reimpose them after they have expired. *Tiger* v. *Western Investment Co.*, 221 U. S. 286; *Brader* v. *James*, 246 U. S. 88; *Talley* v. *Burgess*, 246 U. S. 104. It is found, too, in the repeated holdings that the grant of citizenship to

When the lands of the Five Tribes came to be allotted in severalty, the use of restrictions was a well-settled policy. The restrictions applied to the Five Tribes land did not differ in the slightest from the restrictions applicable to other Indians in respect of either their absolute character or the importance of the element of Federal guardianship. It is true that the device used was not the so-called "trust patent" of the General Allotment Act but was instead a grant in fee subject to restrictions. But there are no differences of substance between the two forms of tenure that in any way affect the obligation of guardianship assumed by the United States. In practical administration, and in the decisions of this Court, "trust" and "restricted" lands have been interchangeable terms. See *United States* v. *Bowling*, 256 U. S. 484, 487; *Minnesota* v. *United States*, 305 U. S. 382, 386. Accordingly, as the Oklahoma courts themselves have recognized, the full and established scope of the traditional protections were adopted by the Five Tribes restrictions.[55]

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allottees has not in any way detracted from the force of the restrictions. *Tiger* v. *Western Investment Co.*, *supra*; *Heckman* v. *United States*, *supra*; *Bowling* v. *United States*, 233 U. S. 528; *United States* v. *Noble*, 237 U. S. 74; *Brader* v. *James*, *supra*.

[55] In *Smith* v. *Williams*, 78 Okla. 297, the court said: "From the beginning, it has been the settled policy of this court, and also of the Federal courts, in determining the validity of deeds to restricted Indian lands, to look to the acts of Congress alone." That restricted lands are under

One other fact must be realized if the restrictions imposed at the time of the allotment are to be understood. There was at that time no State of Oklahoma. The references to tax exemption referred primarily to town or territorial taxes that might be imposed by Congress or by local authorities established by Congress. It is important to stress this point because otherwise the fact that some statutory provisions refer to tax exemption and others to restraints on alienation might be read as implying that neither concept had any necessary relation to the other.[37] The fact is that Federal restrictions, which were not limited to voluntary sale but covered all forms of transfer or encumbrance of Indian lands, imposed as insuperable a barrier to state taxation as to private sale.

These Federal restrictions did not, however, present any barrier to Federal taxation. This

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the exclusive jurisdiction of Congress has also been recognized in many other decisions of that court. *Walker* v. *Brown*, 43 Okla. 144; *Cornelius* v. *Yarbrough*, 44 Okla. 375; *Wilson* v. *Greer*, 50 Okla. 387; *Malone* v. *Wamsley*, 80 Okla. 181; *Collins Investment Co.* v. *Beard*, 46 Okla. 310; *Choctaw Lumber Co.* v. *Coleman*, 56 Okla. 377. The Oklahoma courts have held, too, that so far as the transfers are approved by a state court (with respect to heirs of allottees), the courts act as Federal agencies and are not subject to state control (*supra*, pp. 33–34).

[37] A specific tax exemption in the hands of the allottee becomes a vested right which Congress cannot thereafter remove without compensation. *Choate* v. *Trapp*, 224 U. S. 665. To this extent the exemption, included within the restriction, differs from the larger immunity of which it is a part.

Court had held that Congress had the power to lay taxes upon Indian property within the Indian Territory. *The Cherokee Tobacco,* 11 Wall. 616. At the time of the allotment there was renewed agitation for the taxation of Indian property by local arms of the territorial government, responsible only to Congress.[58] It was against the background of this agitation that specific promises of tax immunity assumed importance. In later legislation specific provisions as to tax immunity are included only where the immunity or the restrictions generally are being limited or where other similar special circumstances appear.[58a]

The protection of Creek lands, based on exclusive Federal control over Indian land trans-

[58] The townships of the Indian Territory insisted that they could establish schools and other essential public services only if permitted to tax Indian lands without restriction. See Sen. Doc. 169, 58th Cong., 2d sess. Section 31 of the act of May 2, 1890, 26 Stat. 81, 95, provided for the establishment in the Indian Territory of incorporated towns and cities with powers to assess and levy taxes for public improvements and generally to meet the expenses of local government.

[58a] The exemption provisions comprise three classes: (a) statutes imposing taxes in certain circumstances and preserving tax exemptions in other circumstances: act of April 26, 1906, sec. 19; act of May 10, 1928, secs. 3–4; act of January 27, 1933, sec. 1; act of June 26, 1936, sec. 1; (b) statutes defining periods of tax exemption: act of June 28, 1898, sec. 11; act of July 1, 1898; act of March 1, 1901, sec. 7, as amended by act of June 30, 1902, sec. 16; (c) statutes according tax exemption to otherwise taxable lands: act of March 2, 1931, as amended by act of June 30, 1932; act of June 18, 1934, sec. 5; act of June 20, 1936, as amended by act of May 1, 1937; act of June 26, 1936, sec. 1.

fers, which had been established or implied in a score of treaties, was four times repeated in the course of the allotments.[59] The Congress also took pains to see that nothing in the creation of the State of Oklahoma should qualify these promises.

Section 1 of the Oklahoma Enabling Act of June 16, 1906 (34 Stat. 267) contained provisions of unusual[60] vigor. It read:

> *Provided*, That nothing contained in the said constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would

[59] The assurance of protection against all forms of encumbrance and alienation (including state taxation) was four times given to the Creek Indians. Section 11 of the Curtis Act of June 28, 1898 (30 Stat. 495); section 7 of the Agreement of March 8, 1900, ratified by act of March 1, 1901 (31 Stat. 861); section 16 of the act of June 30, 1902 (32 Stat. 500); and, finally, the deeds which were issued to each allottee reiterated the assurance.

[60] Compare the act of February 22, 1889, 25 Stat. 676, relating to North and South Dakota, Montana, Washington; the act of July 16, 1894, 28 Stat. 107, relating to Utah, and the provisions in sec. 25 of the very act of June 16, 1906, which related to Arizona and New Mexico.

have been competent to make if this Act had never been passed.

Section 221 of the Enabling Act provided that the constitutional convention to be called should accept the terms and conditions of the act "by ordinance irrevocable," and this step was duly taken on April 22, 1907. Following the Enabling Act, the people of the State of Oklahoma included in their constitution Article I, section 3, by which they renounced any claims to Indian lands, and Article X, section 6, by which they exempted from taxation, "such property as may be exempt by reason of treaty stipulations, existing between the Indians and the United States Government, or by Federal laws during the force and effect of such treaties or Federal laws."

This Court has frequently commented on and applied section 1 of the Enabling act. *Tiger v. Western Co.*, 221 U. S. 286, 309; *Ex parte Webb*, 225 U. S. 663, 662–683; *Ward v. Love County*, 253 U. S. 17. So, too, has the Supreme Court of Oklahoma. *Canfield v. Jack*, 78 Okla. 127, *cert. den.* 253 U. S. 493; *Malone v. Wamsley*, 80 Okla. 181; *Neal v. Travelers Insurance Co.*, 188 Okla. 131; *Gleason v. Wood*, 28 Okla. 502. As the court said in the *Gleason* case, the State is powerless to tax at all until Congress removes the exemption, "thereby bringing it within the operation of the general taxing system of the State."

This conclusion has, indeed, been made express by Congress itself.[42] In the act of April 17, 1937 (50 Stat. 68), permitting a gross production tax to be imposed by Oklahoma on lead and zinc produced from restricted Quapaw lands, the Congress declared:

> In accordance with the uniform policy of the United States Government to hold the lands of the Quapaw Indians while restricted and the income therefrom free from State taxation of whatsoever nature, except as said immunity is expressly waived, and, in pursuance of said fixed policy, it is herein expressly provided that the waiver of tax immunity herein provided shall be in lieu of all other State taxes of whatsoever nature on said restricted lands or the income therefrom, * * *"

This Court has recognized that a plain authorization, which is to be strictly construed, must be found before the state may tax restricted property of members of the Five Civilized Tribes. *Carpenter* v. *Shaw*, 280 U. S. 363, 367-368; *Oklahoma* v. *Barnsdall Corp.*, 296 U. S. 521;

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[42] Various other expressions of Congressional understanding on the point may be cited. Thus, for example, H. Rept. 2415, 71st Cong., 3d sess., p. 1, advocating passage of what is now the act of February 14, 1931, 46 Stat. 1108, declares: "Under existing law the restricted allotted lands of Indians of the Five Civilized Tribes are tax exempt while restricted." See also S. Rept. 982, 70th Cong., 1st sess., pp. 3, 4, 5; S. Rept. 330, 65th Cong., 2d sess., p. 4.

see also *Board of Commissioners* v. *United States*, 308 U. S. 343, 350.

The Federal courts sitting in Oklahoma and the Oklahoma courts themselves, have uniformly announced the rule that, in the absence of express congressional authority, restricted lands are not taxable, and this irrespective of the presence or absence of a specific tax exemption.[a]

The Oklahoma legislature has itself recognized that the fact of restriction operates to exempt the land and its proceeds from state taxation. The act of April 2, 1925 (c. 21, S. L. 1925), in exacting a gross production tax upon minerals, made provision in section 3 for refunds "In all cases of overpayment, duplicate payment or payment made in error on account of the production being derived from restricted Indian lands and therefore exempt from taxation." And the Legislature, in a resolution (S. L. of 1931, p. 395) protesting against the extension of periods of restriction, spoke in these terms:

> Whereas, the said provisions are applicable only to inherited land and will con-

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[a] *United States* v. *Brun*, 253 Fed. 1 (C. C. A. 8); *McKelvey* v. *Board of County Commissioners*, 45 Okla. 10; *Rider* v. *Helms*, 48 Okla. 610; *Kidd* v. *Roberts*, 43 Okla. 603; *Marcy* v. *Board of Commissioners*, 48 Okla. 1; *Brown* v. *Denny*, 52 Okla. 380; *Davenport* v. *Doyle*, 57 Okla. 341; *Watkins* v. *Howard*, 64 Okla. 166; *Wyan* v. *Fugate*, 149 Okla. 21[illegible]; *United States* v. *Shock*, 187 Fed. 862 (E. D., Okla.); see Mills, *Oklahoma Indian Land Laws* (1924), sec. 313; Op. Sol. Int. Dept., 49 L. D. 348.

> tinue such property from the tax rolls of the state * * *

Certainly from the beginning the practical understanding of the Indians, the Federal officials charged with the administration of their affairs, and State tax officials, has been that the state could impose no tax with respect to restricted lands except with the express authority of Congress.

The restricted lands have, of course, always been exempt from ad valorem taxation except so far as authorized by Congress. But the exemption goes far beyond this tax and, in actual practice and general understanding, has included every form of taxation with respect to the restricted property.

Oklahoma has had an intangible property tax since 1917. C. 264, S. L. of 1917; c. 72, S. L. of 1927; c. 66, art. 3, S. L. of 1931; c. 66, art. 4, S. L. of 1939. It has never, so far as the records of the Department of the Interior show, attempted to collect this tax with respect to restricted Indian property. The departmental regulations permit the Superintendents to pay taxes only upon unrestricted property. 25 CFR 221.32.[63]

Oklahoma has had a mortage registration tax since 1913. C. 246, S. L. of 1913; c. 24, sec. 1171, Okla. Stat. Ann. During the period in which re-

[63] The Commissioner's Circular No. 1849, Feb. 3, 1923, directs Superintendents not to pay state taxes on restricted personal property.

stricted Indians were permitted to make mortgage loans, so far as the records of the Department of the Interior show, no effort was made to collect this tax from them.

Oklahoma has had an income tax since 1908. C. 81, S. L. of 1907–1908; 68 Okla. Stat. Ann. p. 769. For 23 years there was no collection from restricted Indians. In 1932 the Solicitor of the Department of the Interior ruled that section 3 of the act of May 10, 1928 (45 Stat. 495), subjecting minerals "to all State and Federal taxes of every kind and character," made the income derived from minerals subject to state taxation after April 26, 1931. 53 I. D. 606. The State apparently made no effort to collect taxes upon other types of income until 1940 and then encountered a refusal by the Department to pay the taxes.[64]

From this history of legislation and administrative practice it seems entirely clear that it has been generally understood by all persons concerned that express congressional permission is necessary if the State of Oklahoma is to impose a tax with respect to restricted property of a member of the Five Civilized Tribes. There has been but one exception, the taxation of restricted lands which were purchased out of restricted funds. *Shaw* v. *Oil Corp.*, 276 U. S. 575. And even here the decision of this Court reversed an administrative

[64] The question was submitted to the Attorney General, who thought it inadvisable to render an opinion, and the Superintendent was then instructed not to pay the taxes.

practice of at least 15 years [65] and was the occasion of four acts of Congress restoring the prior rule."[66]

In short, these restrictions against alienation must be read against a background of treaty promises which the allotment agreements did not abrogate. The United States was still solemnly bound to the Creek Indians by a score of subsisting treaties promising that the Federal Government would protect Creek lands against all forms of alienation and that the Creeks and their lands would never be subjected to state control. In this view the content and the meaning of the restrictions imposed by Congress upon the transfer of Indian land are not to be measured by the rules of conveyancing and the rules of tax statutes. The tracts of land preserved to the Indian allottees and their Indian heirs and assigns were not simply the subjects of a gigantic series of transactions in real property. The allotments were the vestigial remainder of an Indian domain, constantly reduced in size and finally pulverized. They were the last sanctuary from state authority. They must be viewed, and have uniformly been so considered by this Court, not as a covenant introduced into a conveyance between merchants in real estate but as the last remainder of a century of treaties and promises.

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[65] See Brief for the United States, *Board of County Commissioners* v. *Seber* (*No. 556, this Term*), pp. 25–26.

[66] Act of March 2, 1931, 46 Stat. 1471; act of June 20, 1932, 47 Stat. 474; act of June 20, 1936, 49 Stat. 1542; act of May 19, 1937, 50 Stat. 188.

2. *The Origin and Functions of Restrictions on Indian Funds.*—We have spoken so far of the restrictions upon lands. The restrictions upon the cash and bonds found in these cases require separate discussion.

Sales and leases of restricted lands result in the conversion of the proceeds into trust or restricted property. Such personal property remains restricted and subject to the jurisdiction of the Secretary of the Interior, whether the lands from which the proceeds were derived were subject to alienation with the approval of the Secretary of the Interior or with the approval of the appropriate county court. *Parker* v. *Richard,* 250 U. S. 235; *Mott* v. *United States,* 283 U. S. 747, 750.[67] By section 1 of the act of January 27, 1933 (47 Stat. 777), a provision intended as declaratory

[67] The possible exception to this rule is where the lease or sale is approved by the county court and not by the Secretary of the Interior with no requirement for payment of the proceeds to the Secretary of the Interior or his representative. See *United States* v. *Gypsy Oil Co.*, 10 F. (2d) 487 (C. C. A. 8). None of the three cases before this Court falls within the exception since the lease in each case was executed by the original allottee during his lifetime with the approval of the Secretary of the Interior and hence the restricted character of the proceeds therefrom is determined by the ruling of this Court in *Parker* v. *Richard*, *supra*, to the effect that the duty to protect the interests of the full-blood heir by supervising the collection, care, and disbursement of the royalties arising from the lease remains with the Secretary of the Interior.

and retroactive,[68] Congress, legislating separately with respect to the funds and securities of Indians of the Five Civilized Tribes, declared that all such funds and securities then held by or thereafter coming under the supervision of the Secretary of the Interior belonging to Indians of one-half or more Indian blood shall be restricted and subject to the jurisdiction of the Secretary of the Interior until April 26, 1956. The restricted cash and bonds held on behalf of each decedent in the case at bar were accumulated from oil and gas royalties on restricted lands. Under departmental regulations, the proceeds from mineral leases must be paid to a representative of the Secretary of the Interior. 25 CFR 183.18, 183.20.[69] The mechanics of the custody and restrictions are as follows: The income is paid to the Superintendent, who credits the lessor on his books and deposits the funds with either the Treasurer of the United States or individual banks.[70] With the decline in

[68] "The first section of this act would restrict Indians of halfblood, or more, whether enrolled or unenrolled, until after April 26, 1956, and would be retroactive to April 26, 1931, to fill in the gap between the expiration of the act of May 27, 1908, and the passage of this act. The effect would be to hold in the custody of the Secretary of the Interior large sums of money and securities of Indians within the class described." (H. R. Rept. No. 1015, 72d Cong., 1st sess.)

[69] Similar requirements have been in the regulations since 1908. See sec. 20 of the regulations approved April 20, 1908.

[70] Bonds are deposited as security with the Treasurer when the funds are placed in bank deposits.

interest rates over the past decade almost all of the funds have been withdrawn from banks and are either held by the Treasurer of the United States or used to purchase Government bonds which in turn are held by the Treasurer. See act of June 24, 1938 (52 Stat. 1037). The bonds are ordinarily purchased in bulk and interest payments distributed to the credit of the individual Indians in proportion to the amounts of their money used in the purchase. The cash and the interest held by the Treasurer is paid out to the Indian in such amount as may be recommended by the appropriate official of the Department. 25 CFR, 221.2 *et seq.* The validity of these restrictions has long been settled. *Parker* v. *Richard*, 250 U. S. 235; *Mott* v. *United States*, 283 U. S. 747, 750.[71]

So, too, it has always been assumed that restricted funds were exempt from state and local taxation. The issue seems to have been litigated but thrice and in each case the decision, resting upon the plain implications of *United States* v. *Rickert*, 188 U. S. 432, was that the restricted funds were nontaxable. *United States* v. *Thurston County*, 143 Fed. 287 (C. C. A. 8); *United States* v. *Nez Perce County*, 267 Fed. 495 (D. Idaho); *United States* v. *Hughes*, 6 F. Supp. 972 (D. C. N. D. Okla.) (restricted funds of Osage Indians held exempt from Oklahoma taxation).

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[71] See, also, *United States* v. *Hinkle*, 261 Fed. 518 (C. C. A. 8); *Hass* v. *United States*, 17 F. (2d) 894 (C. C. A. 8); *United States* v. *Thurston County*, 143 Fed. 287 (C. C. A. 8).

The restrictions upon the funds held by the Secretary, which were confirmed by the act of January 27, 1933 (47 Stat. 777), are coextensive with the restrictions upon the lands from which the funds were derived. Any doubt on this point should be eliminated by the fact that section 4 of this act applies to personal property held by trust companies the same terms traditionally applied to real property in the definition of restrictions, declaring that restricted funds under trust agreements should not "during the restriction period provided by law, be subject to alienation, or encumbrance, nor to the satisfaction of any debt or other liability of any beneficiary of such trust during the said restriction period." There was, of course, no intention to give to restricted funds held by private trust companies a greater protection against state taxation or other encumbrances than was accorded to funds held in the United States Treasury. The reference to "alienation" and "encumbrance" in section 4 of this act must be regarded as a partial definition of what is involved in the term "restricted," as that term is applied to Indian funds by section 1 of the act.

C. *The Inheritance Tax Contradicts the Restrictions*

We urge that any state tax with respect to restricted property is in conflict with the implications of those restrictions, when construed with

the liberality which has been accorded their terms, and that in the absence of congressional authority no state can use these lands as the subject or the measure of a tax. In particular, we urge as to the inheritance and estate taxes involved in these cases that (1) the tax itself, (2) the lien of the tax, and (3) certain of its administrative features, are each contrary to the Federal restriction.

1. *The Tax.* The question whether taxation by a state is consistent with the existence of restrictions on the alienation of Indian lands arose first in the case of *The Kansas Indians,* 5 Wall. 737, where this Court analyzed the conflict in terms entirely applicable to these cases:

> This treaty contained words of promise that the same care, superintendence, and protection, which had been extended over them in Ohio, should be assured to them in the country to which they were to remove, and also a *guarantee* that their lands should never be within the bounds of any State or Territory, nor themselves subject to the laws thereof. * * * (p. 752).
>
> * * * * *
>
> The Indians who held separate estates were to have patents issued to them, with such guards and restrictions as Congress should deem advisable for their protection. Congress afterwards directed the lands to be patented, subject to such restrictions as the Secretary of the Interior might impose; and these lands are now held by these In-

> dians, under patents, without power of alienation, except by consent of the Secretary of the Interior. (p. 753.)
>
> * * * * *
>
> It is insisted, as the guarantees of the treaty of 1831 are not, in express words, reaffirmed in the treaty of 1854, they are, therefore, abrogated, and that the division of the Indian territory into separate estates, so changes the status of the Indians that the property of those who hold in severalty is liable to state taxation. It is conceded that those who hold in common cannot be taxed. If such are the effects of this treaty, they were evidently not in the contemplation of one of the parties to it, and it could never have been intended by the government to make a distinction in favor of the Indians who held in common, and against those who held in severalty. * * * (p. 755.)

Moreover, in the case of the Miami Indians, dealt with in the same litigation, the Court pointed out that apart from all other considerations, a provision that Miami lands were to be exempt from "levy, sale, execution, and forfeiture" was sufficient to exclude State taxation of such lands. The Court declared (p. 761):

> The position, it seems to us, is too plain for argument. The object of the treaty was to hedge the lands around with guards and restrictions, so as to preserve them for the

> permanent homes of the Indians. In order to accomplish this object, they must be relieved from every species of levy, sale, and forfeiture—from a levy and sale for taxes, as well as the ordinary judicial levy and sale.

No valid distinction can be drawn between the terms of protection given by the United States to the lands of Miami Indians and those given to the lands of Creeks and Seminoles.

In the case of *The New York Indians*, 5 Wall. 761, this Court pointed out that not even an express guarantee in the state statute that the tax would not be enforced by sale while the lands were in Indian possession could validate such a tax. *A fortiori*, the statutes now in question, which contain no such safeguards, "may well embarrass the occupants" (5 Wall. 771), and thus interfere practically, as well as theoretically, with property relations which, for a few more years, the Federal Government has reserved to its own control.

Since the decisions reached in the cases of the Kansas and the New York Indians, in 1866, no state, except Oklahoma, so far as available records indicate, has ever attempted to levy a tax upon the possession or transfer of restricted Indian lands. However, at the turn of the present century, an effort was made by local tax au-

thorities in the State of South Dakota to tax improvements, regarded as personalty, on lands allotted to a Sisseton Indian under the General Allotment Act. There was no specific reference to tax exemption in the governing treaties and statutes, but section 5 of the General Allotment Act provided that the United States should convey the land at the end of the trust period "free of all charge or encumbrances whatsoever." In holding this tax to be forbidden by the federal statutes, this Court reiterated the views expressed in *United States* v. *Rickert*, 188 U. S. 432. It said (p. 437):

> If, as is undoubtedly the case, these lands are held by the United States in execution of its plans relating to the Indians—without any right in the Indians to make contracts in reference to them or to do more than to occupy and cultivate them—until a regular patent conveying the fee was issued to the several allottees, it would follow that there was no power in the State of South Dakota, for state or municipal purposes, to assess and tax the lands in question until at least the fee was conveyed to the Indians. These Indians are yet wards of the Nation, in a condition of pupilage or dependency, and have not been discharged from that condition.

The views expressed in the *Rickert* case have been consistently followed in this Court. See *Carpenter* v. *Shaw*, 280 U. S. 363 and cases therein cited.

While the Court has frequently spoken of the exemption of restricted lands as an exemption attaching to a federal instrumentality, it should be noted that Indian tax exemption was not only recognized in the Constitution (Art. I, sec. 2) but was upheld by this Court before Chief Justice Marshall first enunciated the "instrumentality" doctrine. *New Jersey* v. *Wilson*, 7 Cranch 164. It cannot, therefore, be viewed as part of the legitimate or illegitimate progeny of that doctrine. The exemption of restricted lands from state taxes is more precisely viewed as an incident of the exclusive power of Congress to control the transfer of Indian property. As this Court said in *Bowling* v. *United States*, 233 U. S. 528, 535: "The authority of the United States to enforce the restraint lawfully created cannot be impaired by any action without its consent." Whether or not the Indian lands, subject to restrictions, are themselves "instrumentalities" of the United States, both the restrictions and their implications must be given effect because they have been validly adopted as a means of discharging the constitutional duty of the United States.

From this standpoint it makes no difference whether the state tax is linked to the possession or the transfer of Indian property or, if the latter, whether it is attached to transfers *inter vivos* or to transfers at death. Each of these

forms of taxation equally interferes with the exclusive control of the federal government over the transfer of Indian property. Obviously the federal government cannot provide for the transfer of an entire estate to a specified set of heirs or devisees if the state in which the restricted property is situated can direct that a portion of the restricted estate be transferred to the state itself in the form of a tax payment. And if the Indian has only land, some part must be sold to satisfy the tax and the prohibition against voluntary or involuntary alienation has been qualified by or in response to the state's demands. On the other hand, if the restricted estates of Indians do possess liquid assets, as in the cases here, the fact remains that even this personal property is restricted, and to compel its sale is to interfere no less with the guardianship exercised over this property by the Secretary of the Interior.[12] Again, the tendency of inheritance taxes is towards a fragmentation of estates. If there is to be a tendency to break up restricted lands, this is for Congress and not Oklahoma to decide.

This doctrine, universally recognized with respect to *ad valorem* taxation of restricted prop-

[12] It is true of course, also that the Indian who possesses a restricted estate may dispose of it by will with the result that it may be divided among several heirs. But this is a result that has at least been expressly permitted by Congress, which has moreover itself determined to what extent the inherited property shall remain restricted.

erty, is equally applicable to a tax linked to the transfer of property, for control over the transfer of Indian property is the very essence of the federal government's jurisdiction in Indian matters." It is true that Congress has never in so many terms prohibited a state from levying an inheritance tax on restricted Indian property. Nor for that matter has it expressly prohibited a state from levying a poll tax on Indians based upon the amount of restricted property owned. There are in fact an infinite number of ways by which an Indian may be separated from his property and at an early period in our history, when a good many of these possible methods had been tried, Congress wisely eschewed any effort to specify the particular methods of transfer which might possibly be used by states or citizens to achieve that widely popular objective. Rather, Congress has deliberately chosen to use the broadest possible terms, in the statutes here relevant the terms "alienation" and "encumbrance," and these broad terms have from the beginning been fairly and broadly construed by all courts. Apart from the present litigation, they have similarly been construed by all the states as precluding the imposition of a state inheritance tax upon restricted property.

[11] See Margold, Introduction to *Handbook of Federal Indian Law*, pp. xii-xiii.

We recognize that the inheritance tax, particularly if there be liberal exemptions, may offer a more desirable means of introducing the Indian citizens of Oklahoma to the responsibilities of tax-payers than does an *ad valorem* property tax upon restricted lands. But this, we submit, is a question for Congress and not the courts. For many years, as we have shown, it has been assumed by all concerned that the Oklahoma inheritance tax was inapplicable to restricted Indian property. For many years it has been recognized that restrictions automatically carried with them freedom from all state taxation not expressly authorized by Congress. For many years Congress has legislated with precision and with specificity when state taxation of restricted property was to be allowed (see *infra*, pp. 81–82). Against this background it needs more than a conclusion that it would be good policy for Congress to allow state inheritance taxation to justify the Court in changing the rule as to taxation of restricted property.

At least so far as concerns the restricted lands involved in these cases, there is nothing in *Shaw* v. *Oil Corp.*, 276 U. S. 575, that casts doubt upon the rule that the effect of restrictions is to bar state taxation. This case involved the question whether lands purchased for Indians with the proceeds of restricted property could not only be subjected to restrictions against voluntary

alienation, as this Court had already held in *Sunderland* v. *United States,* 266 U. S. 226,[14] but were also rendered tax exempt by virtue of the restrictions inserted in the deed at the direction of the Secretary of the Interior. This Court held that this could not be done by "a mere conveyancer's restriction," with respect to land that was not the land originally allotted. But it rather plainly intimated that the case would have been otherwise if the restrictions had been imposed by an act of Congress, as is the case here. Thus the Court said (pp. 580–581):

> * * * But they [the purchased lands] are far less intimately connected with the performance of an essential governmental function than were the restricted allotted lands, and the accomplishment of their purpose obviously does not require entire independence of state control in matters of taxation. * * * There are some instrumentalities which, though Congress may protect them from state taxation, will nevertheless be subject to that taxation unless Congress speaks.

Indeed, Congress acted upon this suggestion of the Court, and provided a limited immunity for the purchased and restricted lands. See the act

[14] It should be noted that in the *Sunderland* case the Court expressly limited its decision to the power of the Secretary to prevent a voluntary transfer of restricted property by the Indian owner (266 U. S. at 233).

of June 20, 1936 (49 Stat. 1542), as amended by the act of May 19, 1937 (50 Stat. 188); and the acts of March 2, 1931 (46 Stat. 1471), and June 30, 1932 (47 Stat. 474). See *Board of Commissioners* v. *Seber*, No. 556, this Term, pending decision.

The *Shaw* case, it is true, might have cast some doubt upon the exemption of the cash and bonds involved in cases of Lucy and Nitey, who died before the act of January 27, 1933, since at that time the funds were not restricted by express statutory provision, but only by long and judicially sanctioned practice. However, that act as noted above (pp. 67–68), was merely declaratory and was intended to be retroactive. And, if there otherwise were doubt, this Court may legitimately give heed to the congressional policy as reflected by the legislative reversal of the rule of the *shaw* case.

2. *The Lien.* The inheritance taxes involved in these cases impose, as we have shown, a lien upon all of the property of the decedent. The lien imposed by the Oklahoma statutes attaches at the moment of death, and thus an encumbrance is at once created that is entirely inconsistent with the restrictions. The possible consequences of a lien are so far-reaching that this Court held at an early date, in *The New York Indians*, 5 Wall. 761, that its mere existence in a state taxing statute invalidates it, despite the inclusion of a provision to the

effect that no foreclosure of a lien should affect the Indian's right of occupancy.[75]

It is of the first significance in this regard that Congress, in permitting specified types of taxation upon restricted property, has ordinarily taken pains that no tax lien should attach. The act of May 6, 1910 (36 Stat. 348), permitting taxation of restricted lands of the Omahas, provided that there should be no seizure or sale but that the taxes if unpaid should be canceled upon a certificate of the Secretary of the Interior that there were no funds. The act of March 3, 1921 (41 Stat. 1225), authorizes a tax on mineral production from Quapaw lands and provides that "such tax shall not become a lien or charge of any kind or character against the land or other property of said Indian owner." The act of May 27, 1924 (43 Stat. 176), provides that the production of minerals on restricted lands of the Kaw Indians may be taxed by the State of Oklahoma, and carries the same proviso that the tax shall not be a lien or charge against the property of the restricted

[75] The recent decision in the case of *United States* v. *Alabama*, 313 U. S. 275, does not detract from the force of this decision. It was merely held in the *Alabama* case that, when the United States purchased land in a state to which a tax lien had already attached under state law, the United States necessarily held the land subject to the tax lien although, by virtue of the Government's ownership, it could no longer be foreclosed. The State was under no disability, as it is here, at the time the lien attached, since the land was then in private ownership, and the Court thus held only that the lien survived the transfer of the land to the Government.

Indian owner. The act of May 29, 1924 (43 Stat. 244), provides that the unallotted lands on Indian reservations other than the Five Tribes and Osage Indians shall be subject to lease for mining purposes and permits the taxation of mineral production by the state in which the lands are located in all respects the same as production on unrestricted lands; it, too, contains the proviso that the tax shall not become a lien against the land or property of the Indian owner. The act of April 17, 1937 (50 Stat. 68), amended the Quapaw act of March 3, 1921, *supra*, to provide that the tax on the gross production of minerals on restricted Quapaw lands shall be in lieu of all other state taxation, and further provides that the tax shall not become a lien against the land or other property of the Indian owner.[76]

This course of discriminating legislation heavily underscores the importance of subjecting restricted lands to taxation, if this be considered desirable, through a legislative qualification of

[76] A few statutes permitting taxation contain no provision forbidding the lien. The act of March 3, 1921 (41 Stat. 1249), permits a mineral tax on Osage lands, but these are owned by the Nation, not the individuals. The act of May 10, 1928 (45 Stat. 495), authorizing mineral production taxes upon restricted lands of members of the Five Civilized Tribes, contains no prohibition of a lien, but the tax is by its nature imposed upon the liquid royalties of the Indian received by the Secretary. The same act, permitting the taxation of restricted lands in excess of 160 acres, contains no prohibition against a lien but the Indian is assured of a residue of tax-free lands which will remain in his possession.

the restrictions rather than through a judicial reversal of a practice and understanding of many years. The Court cannot easily prescribe that the tax shall be paid if possible but that restricted lands shall not be sold; it cannot well prescribe that 160 acres, or some other figure, of restricted lands be exempt but that the remainder shall be taxed. It can, if it chooses, decide the general policy; it can, if it chooses, pass a critical judgment on the reasoning which has led Congress to assume that restricted lands are beyond the reach of the state tax collector and has led all concerned to assume that this general exemption included inheritance taxes. But it must encounter the greatest difficulty if it is also to introduce any of the limitations which Congress has found appropriate with respect to other taxes.

Of even greater importance, a decision of this Court that the tax applies to restricted lands would apparently cast a cloud upon and threaten foreclosure of every parcel of restricted land in Oklahoma which has been transferred at the death of an owner with property above the statutory exemptions since 1915. We have shown above (pp. 25–27) that the inheritance and estate taxes involved in these cases carry a lien which remains upon the transferred property until paid. In that event, a reversal of these cases, instead of affording to the Indians the generous protection which they have always received at the bar of this

Court, would have converted the restrictions from a protection to an ensnarement, and would seem to serve as the vehicle for one of the major instances of land divestment in a history which is already both long and tragic in this respect."

3. *The Mechanics of Collection.*—Both section 10 of chapter 162 of the Session Laws of Oklahoma of 1915, and section 7 of chapter 296 of the Session Laws of Oklahoma of 1919, provide that an executor or administrator "shall not deliver any legacy or property subject to the tax under this act to any person until he shall have collected the tax thereon." Since the restricted property is in the control and custody of the United States, the provision cannot validly be applied.

Sections 8 and 5 of the respective statutes, as well as section 25 of the 1935 tax law, also provide that the executor or administrator shall not be entitled to any final accounting unless he can produce a receipt showing that the inheritance taxes have been paid. Neither the Secretary nor

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[77] Conceivably, this Court might in some fashion excise the lien from the tax statute, as Congress has frequently done in permitting a limited taxation of restricted lands. Conceivably, it might in simple justice make its decision prospective only. *Cf. Montgomery Ward & Co.* v. *Duncan*, 311 U. S. 243, 255; Reed, J., concurring in *R. F. C.* v. *Prudence Group*, 311 U. S. 579, 583; Brief for Government on Rehearing in *Helvering* v. *Gerhardt*, Nos. 779-781, 1938 Term. But the very difficulty of these devices affords powerful evidence that the State here asks the Court to provide a result which is legislative in its nature.

the Superintendent can be supposed to stand in need of a state court discharge, and it cannot be that Congress intended to leave the estates unsettled until they submitted themselves to the state court.

Section 9 of the 1935 tax law authorizes an executor or administrator to convert property of an estate into cash if necessary to pay the estate tax, and also makes them personally liable for the tax. The provisions are either inapplicable to the restricted property held by the Secretary or are invalid.

Section 10 of the same law forbids any bank or similar institution which may have custody of securities from delivering them without retaining a sufficient amount of such securities to pay the estate tax. No state law can fix the terms on which the United States may withdraw its deposits from its banks, and the provision is absurd if applied to the deposits with the Treasurer of the United States.

It may be that this Court could make a discriminating excision of the administrative features of the Oklahoma inheritance taxes here involved and produce a workable tax. But, as in the case of the tax liens, the inherent difficulties of this essentially legislative task are themselves strong arguments against any sudden imposition of this tax by judicial decision.

4. *The Administrative Construction.*—The first inheritance tax was enacted by the Oklahoma Leg-

islature in 1908. S. L. 1907–1908, secs. 7712–7715, pp. 733–734. We have shown above (pp. 37–39) that during most of the subsequent 35 years the state officials themselves have made no effort to collect a tax upon the transfer at death of restricted property of members of the Five Civilized Tribes, and that during the same period, the Indians and the federal officials administering their affairs have always assumed that the transfer at death of restricted property was not, in the absence of congressional authority, taxable by the state. During this period, there have been repeated congressional re-examinations of the question of restrictions and exemptions of Indian lands in Oklahoma.

This long-continued administrative practice was, as we have shown above (pp. 38–39), made known to Congress.

We have, then, a 35-year period in which neither the Federal officials charged with the administration of Indian affairs, nor the Indians themselves supposed that the state inheritance taxes were applicable to restricted property transferred by members of the Five Civilized Tribes. The administrative construction was contemporaneous, and must for this reason be given weight. *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315; *United States* v. *Amer. Trucking Ass'ns*, 310 U. S. 534. The administrative construction was by the Department which participated in the formulation of much of the Federal legislation, and must for

this reason be given weight. *Blanset* v. *Cardin*, 256 U. S. 319, 326; *Hassett* v. *Welch*, 303 U. S. 303, 310–311. The administrative construction was long-continued, and must for this reason be given weight. *New York, N. H. & H. R. Co.* v. *I. C. C.*, 200 U. S. 361; *Norwegian Nitrogen Co.* v. *United States, supra*, 313–315. The administrative construction was followed by a series of statutes amending and adjusting the scope of the Federal restrictions and must for this reason be given weight, as having presumably been approved and confirmed by Congress. *Taft* v. *Commissioner*, 304 U. S. 351, 357; *Great Northern Ry. Co.* v. *United States*, 315 U. S. 262, 275–276.

The administrative construction was, finally, as we have shown, not only that of the Federal officials who were charged with the duty of protecting the interests of the Indians but was also for most of this period that of the tax officials who were charged with the duty of collecting all legally available revenue, and is for this reason entitled to especial weight. *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, 351–352; *United States* v. *Cooper Corp.*, 312 U. S. 600, 614.

D. THE EFFECT OF THE STATUTORY EXEMPTIONS

Much of the property involved in these cases is not only restricted but is subject to a specific tax exemption. We have shown above (pp. 58–59) that these exemptions were not primarily designed

to offer state tax exemption, which was implied by the restrictions, but to p r o v i d e an exemption against Federal taxation or to limit the exemption which otherwise would have applied. However, it may be well briefly to discuss the terms and the effect of these exemptions viewed independently of the restrictions which they qualify.

The specific tax exemptions which appear in these cases are cast in broad and general language: "nontaxable * * * in perpetuity";[7] "nontaxable * * * for twenty-one years";[8] "exempt from taxation as long as the title remains in the original allottee"[9] and "exempt from taxation while the title remains in the Indian" or in his full-blood heir or devisee."[10]

These broad terms must be read to include an exemption against all forms of state taxation with respect to the lands. They are not exemptions carved out of a general taxing statute, and therefore to be construed strictly. They are, instead, the last vestiges of the Indians' traditional and often-promised freedom from state control and state exaction. Many treaties had solemnly guaranteed this freedom (*supra*, pp. 52–55) and the Indians had bitterly opposed the progressive inroads on their self-government and

[7] Act of July 1, 1898 (30 Stat. 568).

[8] Act of March 1, 1901 (31 Stat. 861); act of June 30, 1902 (32 Stat. 500).

[9] Act of April 26, 1906 (34 Stat. 137).

[10] Act of May 10, 1928, sec. 4 (45 Stat. 495).

their freedom from state control and taxation. When, in the Allotment Agreements, it was stipulated that the homestead or the allotted lands should not be taxed, it must have meant just that to the Indians. Certainly they were not expected, at their peril, to inquire into the white man's theories of taxation and to demand (many years in advance of this Court's clarifications) that the exemption specify that it include "indirect" as well as "direct" taxation; that it cover "excises" as well as "imposts"; that it reach to taxes on the shift of economic benefits as well as to taxes on the "economic benefits," the lands, themselves.

We are dealing, in short, with the last residue of an all-inclusive exemption, not only from state taxation but from state control, and it is not, in cases such as this, the residual exemption but the exceptions and the inroads on the tribal immunity which must be read strictly. In *Carpenter* v. *Shaw*, 280 U. S. 363, this Court extended the Choctaw allotment exemptions beyond land or real estate taxes to include a tax on mineral royalties. The Court said (280 U. S. at 366–367):

> While in general tax exemptions are not to be presumed and statutes conferring them are to be strictly construed, * * * the contrary is the rule to be applied to tax exemptions secured to the Indians by agreement between them and the national government. * * * Such provisions are

> to be liberally construed. Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith * * *. And they must be construed not according to their technical meaning but "in the sense in which they would naturally be understood by the Indians." *Jones* v. *Meehan*, 175 U. S. 1, 11.

This is a settled rule in this Court. *Worcester* v. *State of Georgia*, 6 Pet. 515, 582; *The Kansas Indians*, 5 Wall. 737, 760; *Choate* v. *Trapp*, 224 U. S. 665, 675; *Ex parte Webb*, 225 U. S. 663, 683; *Oklahoma* v. *Barnsdall Corp.*, 296 U. S. 521, 526.

For this reason, decisions that statutory tax exemptions do not include an exemption from estate taxes are inapplicable here. See *U. S. Trust Co.* v. *Helvering*, 307 U. S. 57 (estate tax on proceeds of War Risk Insurance); *Murdock* v. *Ward*, 178 U. S. 139 (Federal inheritance tax on Federal bonds); *Hamersly* v. *United States*, 83 C. Cls. 687, cert. den., 300 U. S. 659 (gift tax on Federal bonds); *Phipps* v. *Commissioner*, 91 F. (2d) 627 (C. C. A. 10); *cf. United States* v. *Stewart*, 311 U. S. 60 (income tax on capital gains on Farm Loan bonds). By the same token, decisions that a supposed constitutional immunity of government bonds does not extend to inheritance or estate taxes are inapplicable. See *Plummer* v. *Coler*, 178 U. S. 115; *Greiner* v. *Lewellyn*,

258 U. S. 384; *cf. Willcuts* v. *Bunn*, 282 U. S. 216. These cases, it may be added, are inapplicable not only because of the peculiar features of Indian law but also because the bases of the supposed immunity—a tax on the government's transaction, and a burden on its operations—were not present in the collateral transaction of a transfer at death, while the basis of the immunity here, an absence of state power to tax or to control transfers of restricted lands, is equally applicable to the transfer at death.[32]

As we have shown, the Indians and the Federal officials have for 35 years each considered all transfers of restricted property to be exempt from any form of state taxation, and the state officials themselves have for most of this period so considered it. If the language of the tax exemptions is to be read as it was understood in the allotment agreements, and as this meaning was reflected in subsequent practice and statutes, they must be read to include inheritance taxes upon the transfer of restricted lands within their prohibitions."

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[32] No special attention need be paid *United States* v. *Perkins*, 163 U. S. 625, and *Snyder* v. *Bettman*, 190 U. S. 249, which held that a tax may be laid by the Federal or state government on a legacy to the other. We do not claim an immunity of the Indian, or of legacies to him, but only of the transfer of restricted property.

[33] If the decision of the Court should turn on the presence of specific tax exemptions, it would cover, under the governing legislation, all of the allotted lands of Lucy and Nitey and the 40-acre homestead and 120 acres of the surplus allotments of Wosey Deere (see *supra*, pp. 4-12).

E. THERE IS NO THEORY WHICH WOULD SERVE TO PERMIT THE STATE TO TAX THE TRANSFER OF RESTRICTED PROPERTY AT DEATH

We have shown that the inheritance and estate taxes involved in these cases are inapplicable to restricted property by the force of the controlling Federal statutes which impose the restrictions upon the transfer of this property. There remains only to consider whether there is anything which can be urged as a special justification for the tax. We can think of only two arguments: (1) the tax is the price of a privilege conferred by the state; and (2) the rule as to Federal estate taxes applies equally to state taxation. Neither is valid.

1. *The Transfer at Death is Not a State Privilege.*—We have discussed above (pp. 28–35) the nature of the probate system which is applicable to the restricted property of members of the Five Civilized Tribes. From this it is entirely clear that the devolution of restricted property is a privilege granted by Federal not state law, and is accomplished jointly through Federal officials and state courts serving as Federal agencies. There is, therefore, no room for an argument that the descent or distribution of the restricted property is a state-conferred privilege of such a nature as to permit the imposition of an otherwise forbidden tax upon the transfer at death.

The argument would not be sound, in any event, since the exercise of a state privilege is insufficient

to justify taxation in conflict with a Federal statute which operates to immunize the transaction. See, e. g., *Federal Land Bank* v. *Crosland*, 261 U. S. 374; *Pittman* v. *Home Owners' Corp.*, 308 U. S. 21.

2. *The Rule as to Federal Estate Taxation is Inapplicable.* In *Landman* v. *Commissioner of Internal Revenue*, 123 F. (2d) 787 (C. C. A. 10), cert. den., 315 U. S. 810, the court below held that the Federal estate tax was applicable to restricted lands and funds of a member of the Five Civilized Tribes. The opinon was placed on the grounds that: (1) the general doctrine of intergovernmental immunity has narrowed in recent years, (2) the Federal statute reached to the estate of "every decedent," and (3) the tax was not placed directly on the restricted and exempt property but upon the shift of the economic benefits. The first ground of the opinion is irrelevant to our argument, since we place no reliance upon the doctrine of intergovernmental tax immunity. The second ground does not contradict our position, as we show below. The third ground is contrary to our position and, we think, reads the exemptions carried by the restrictions with too narrow and pedantic an eye.

We do not, however, take issue with the *Landman* decision and think its result correct. It is, however, inapplicable to the present cases. The restrictions upon the property, which are the basis of our argument and the foundation of the long

practice of exempting restricted property and its transfer from state taxation, were not restrictions against the United States. They were restrictions against third persons, whether individuals or states. Quite obviously, the Congress did not intend to curtail the power of the United States when it forbade alienation except with the approval of the Secretary of the Interior.[54] Equally obviously, as we have shown above (pp. 48–66), it did intend to curtail the power of state officials when it forbade both voluntary and involuntary alienation of the restricted property. Accordingly, a Federal tax on the property or its transfer would in no sense contradict the Federal restrictions, while a state tax, unauthorized by Congress, would be a flat contradiction of the Federal restrictions upon outside interference.

This basic distinction between state and Federal taxation is, the Court will note, only indirectly a product of Article VI of the Constitution and the resulting supremacy of the Federal laws. It is, in its immediate application, simply a question of the intended scope of the restrictions. But the same result is reached if one views the question from the broader ground of Article VI. A Federal tax

[54] Compare the treaties of 1866, 14 Stat. 755, 785, which subject the Creeks and the Seminoles to Federal but not state control (*supra*, p. 54), and contrast the minute control reserved to the United States in the allotment agreements and subsequent legislation with the provisions of the Enabling Act which so carefully excluded state jurisdiction over Indian Affairs (see *supra*, pp. 60–61).

which stands in substantial contradiction of a Federal restriction or a Federal exemption is not barred by the Constitution. But a state tax which is in such substantial contradiction of Federal statutes as that here presented must without more fall before the force of Article VI.

F. THE DECISION BELOW WAS COMPELLED BY CHILDERS V. BEAVER

We have reserved until the end our argument based upon the decision of this Court in *Childers v. Beaver*, 270 U. S. 555. This restraint is due to our belief that the decision, while correct in result, rests upon reasoning which is not in every respect satisfactory. Thus, while (1) we take issue with petitioner's contention that the case is distinguishable, (2) we advance it as support for our position only with considerable hesitation.

1. *The Case Is Not Distinguishable.*—The *Beaver* case involved an attempted application of the state inheritance tax to the restricted lands of the Quapaws. The State argued there, as it does here, that the property descended under state law and was therefore subject to state taxation. This Court unanimously rejected the argument. Its entire opinion, omitting the statement and citations, reads (p. 559):

> The duty of the Secretary of the Interior to determine the heirs according to the State law of descent, is not questioned. Congress provided that the lands should

> descend and directed how the heirs should be ascertained. It adopted the provisions of the Oklahoma statute as an expression of its own will—the laws of Missouri or Kansas. or any other State, might have been accepted. The lands really passed under a law of the United States, and not by Oklahoma's permission.
>
> It must be accepted as established that during the trust or restrictive period Congress has power to control lands within a State which have been duly allotted to Indians by the United States and thereafter conveyed through trust or restrictive patents. This is essential to the proper discharge of their duty to a dependent people; and the means or instrumentalities utilized therein cannot be subjected to taxation by the State without assent of the federal government.

The opinion, whatever the adequacy of the reasoning, is entirely applicable here. The property passed under federal not state law. The use of the state courts for one part of the probate function did not make the descent or inheritance one under state law or the probate function a state rather than Federal function. The restrictions continued, and the Government's duty to a dependent people was present, equally with these Five Tribes decedents as with the Quapaw decedent.

The petitioner argues that the Quapaw statutes are so different from the Five Tribes statutes

that the *Beaver* case is not controlling (Pet. 20–26). It relies on sections 1 and 2 of the act of June 25, 1910 (36 Stat. 855), as amended by the act of February 14, 1913 (37 Stat. 678). These sections give to the Secretary power to determine heirship and to approve wills. But this simply shows that Congress has provided a different probate mechanism, and not that the function is any the less a Federal function or the governing law any the less Federal law in the Five Tribes than in the Quapaw probate system. Petitioner relies further on the contrasting results in *Blansett* v. *Cardin*, 256 U. S. 319, and *Blundell* v. *Wallace*, 267 U. S. 374. The *Blansett* case held that the Oklahoma statute forbidding disinheritance of the husband was inapplicable to a Quapaw will, because the Secretary under the acts of 1910 and 1913 had the exclusive power to approve the will, while the *Blundell* case held the statute applicable to a Five Tribes will, because there was no conflict with the Federal statute which contemplated that the Indian will should in general be subject to state law. These cases illustrate simply particular differences in the statutes governing the two probate systems and in no sense contradict the settled rules that Five Tribes estates pass under Federal law and through a Federal probate system.

In *Childers* v. *Pope*, 119 Okla. 300, the Supreme Court of Oklahoma followed the

Beaver case and held the inheritance tax inapplicable to the estate of an Osage decedent. The Osage probate system, it may be noted, differs from those of both the Quapaw and Five Tribes. The will of a deceased Osage must, as with the Quapaws, be approved by the Secretary but the heirs, as with the Five Tribes, are to be determined by the state courts. Sections 3 and 8, act of April 18, 1912 (37 Stat. 86); *Work* v. *Lynn*, 266 U. S. 161. In the *Pope* case the deceased Osage died intestate, so the case seems to be on all fours with the present cases.

2. *The Result is Correct.*—The reasoning in the *Beaver* case, as suggested above, is not entirely satisfactory. The opinion states two propositions: (1) the property passed under Federal law, and (2) the restricted lands are instrumentalities of Congress and may not be taxed without its consent.

The last proposition, in the breadth with which it is stated, cannot be accepted. See *Shaw* v. *Oil Corp.*, 276 U. S. 575; *James* v. *Dravo Contracting Co.*, 302 U. S. 134; *Helvering* v. *Mountain Corp.*, 303 U. S. 376; *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466; *Alabama* v. *King & Boozer Co.*, 314 U. S. 1. However, as indicated above, the statutory restrictions serve in themselves to forbid taxation upon the land or upon its transfer, and the decision of the Court in the *Beaver* case is entirely correct if the generaliza-

tion of "instrumentality" be taken to be a convenient shorthand for the settled rule that the State can neither tax nor encumber restricted lands nor their transfer.

The first proposition, if construed to mean that the State cannot tax any transfer or privilege conferred by Federal law, is also unacceptable. *Knowlton* v. *Moore*, 178 U. S. 41; see *Graves* v. *New York ex rel. O'Keefe, supra; James* v. *Dravo Contracting Co., supra; Helvering* v. *Mountain Corp., supra.* But here again the difficulty may be as much one of language as of basic reasoning. The State apparently had argued that the transfer of the property at death was possible only because of a privilege conferred by State law. Mr. Justice McReynolds may be supposed to have taken, as the simplest of the two answers available (*supra*, pp. 92–93), that which pointed out that the transfer was accomplished not by State but by Federal law.

In short, the *Beaver* case reached an entirely correct result and perhaps even its reasoning is sound if the opinion be understood to mean that: (1) in view of the settled effect of restrictions to remove land from state taxation, the state could not tax an "instrumentality" which was so protected and (2) the state could not argue that the tax was nonetheless a legitimate price of a privilege, for the property passed under Federal not state law.

CONCLUSION

For these reasons, it is respectfully submitted that the decision of the court below should be affirmed.

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The Solicitor General authorizes the filing of this brief. The preparation of the brief was assigned to the Department of the Interior. The Solicitor General takes no exception to the position taken.

CHARLES FAHY,
Solicitor General.

APRIL, 1943.

APPENDIX

TREATIES

Treaty of September 18, 1823 (7 Stat. 224).

Article I:

The undersigned chiefs and warriors, for themselves and their tribes, have appealed to the humanity, and thrown themselves on, and have promised to continue under, the protection of the United States, and of no other nation, power, or sovereign; and, in consideration of the promises and stipulations hereinafter made, do cede and relinquish all claim or title which they may have to the whole territory of Florida, with the exception of such district of country as shall herein be allotted to them.

Article IV:

The United States promise to guaranty to the said tribes the peaceable possession of the district of country herein assigned them * * *

Treaty of March 24, 1832 (7 Stat. 366).

Article 14:

The Creek country west of the Mississippi shall be solemnly guaranteed to the Creek Indians, nor shall any State or Territory ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves, so far as may be compatible with the general jurisdiction which Congress may think proper to exercise over them. And

the United States will also defend them from the unjust hostilities of other Indians, and will also as soon as the boundaries of the Creek country West of the Mississippi are ascertained, cause a patent or grant to be executed to the Creek tribe; agreeably to the 3d section of the Act of Congress of May 2d, (28) 1830, entitled "An Act to provide for an exchange of lands with the Indians residing in any of the States, or Territories, and for their removal West of the Mississippi."

Treaty of May 9, 1832 (7 Stat. 369).

Article I:

The Seminole Indians relinquish to the United States, all claim to the lands they at present occupy in the Territory of Florida, and agree to emigrate to the country assigned to the Creeks, west of the Mississippi river; it being understood that an additional extent of territory, proportioned to their numbers, will be added to the Creek country, and that the Seminoles will be received as a constituent part of the Creek nation, and be readmitted to all the privileges as members of the same.

Treaty of February 14, 1833 (7 Stat. 417).

Article 3:

The United States will grant a patent, in fee simple, to the Creek Nation of Indians for the land assigned said nation by this treaty or convention, whenever the same shall have been ratified by the President and Senate of the United States—and the right thus guaranteed by the United States shall be continued to said tribe of Indians, so long as they shall exist as a nation, and continue to occupy the country hereby assigned them.

Treaty of March 28, 1833 (7 Stat. 423).

Preamble:

* * * * *

Now, therefore, the Commissioners aforesaid, by virtue of the power and authority vested in them by the treaty made with Creek Indians on the 14th of February 1833, as above stated, hereby designate and assign to the Seminole tribe of Indians, for their separate future residence, forever, a tract of country lying between the Canadian river and the north fork thereof * * *.

Treaty of August 7, 1856 (11 Stat. 699).

Article I:

The Creek Nation doth hereby grant, cede, and convey to the Seminole Indians, the tract of country included within the following boundaries * * *

Article III:

The United States do hereby solemnly guarantee to the Seminole Indians the tract of country ceded to them by the first article of this convention; * * *

Article IV:

The United States do hereby solemnly agree and bind themselves, that no State or Territory shall ever pass laws for the government of the Creek or Seminole tribes of Indians, and that no portion of either of the tracts of country defined in the first and second articles of this agreement shall ever be embraced or included within, or annexed to, any Territory or State, nor shall either, or any part of either, ever be erected into a Territory without the full and free consent of the legislative authority of the tribe owning the same.

Treaty of June 14, 1866 (14 Stat. 785).

Article 12:

The United States reaffirms and reassumes all obligations of treaty stipulations with the Creek nation entered into before the treaty of said Creek nation with the so-called Confederate states, July tenth, eighteen hundred and sixty-one, not inconsistent herewith; and further agrees to renew all payments of annuities accruing by force of said treaty stipulations from and after the close of the present fiscal year, June thirtieth, eighteen hundred and sixty-six, except as is provided in article eleventh.

Treaty of March 21, 1866 (14 Stat. 755).

Article I:

* * * * * *

* * * In return for these pledges of peace and friendship, the United States guarantee them quiet possession of their country, and protection against hostilities on the part of other tribes; * * *

* * * * *

Article VII:

The Seminole nation agrees to such legislation as Congress and the President may deem necessary for the better administration of the rights of person and property within the Indian territory: *Provided, however,* [That] said legislation shall not in any manner interfere with or annul their present tribal organization, rights, laws, privileges, and customs.

* * * * *

Article IX:

The United States reaffirms and reassumes all obligations of treaty stipulations entered into before the treaty of said Semi-

nole nation with the so-called confederate states, * * *

Federal Statutes

Act of March 3, 1893 (27 Stat. 612, 645).

Section 15:

The consent of the United States is hereby given to the allotment of lands in severalty not exceeding one hundred and sixty acres to any one individual within the limits of the country occupied by the Cherokees, Creeks, Choctaws, Chickasaws, and Seminoles; and upon such allotments the individuals to whom the same may be allotted shall be deemed to be in all respects citizens of the United States. * * *

Section 16:

The President shall nominate and, by and with the advice and consent of the Senate, shall appoint three commissioners to enter into negotiations with the Cherokee Nation, the Choctaw Nation, the Chickasaw Nation, the Muscogee (or Creek) Nation, the Seminole Nation, for the purpose of the extinguishment of the national or tribal title to any lands within that Territory now held by any and all of such nations or tribes, either by cession of the same or some part thereof to the United States, or by the allotment and division of the same in severalty among the Indians * * *

Act of June 28, 1898 (30 Stat. 495, 497).

Section 11:

* * * *Provided further,* That the lands allotted shall be nontransferable until after full title is acquired and shall be liable for

no obligations contracted prior thereto by the allottee, and shall be nontaxable while so held. * * *

Act of July 1, 1898 (30 Stat. 567).

All contracts for sale, disposition, or encumbrance of any part of any allotment made prior to date of patent shall be void.

* * * * *

When the tribal government shall cease to exist the principal chief last elected by said tribe shall execute, under his hand and the seal of the Nation, and deliver to each allottee a deed conveying to him all the right, title, and interest of the said Nation and the members thereof in and to the lands so allotted to him, and the Secretary of the Interior shall approve such deed, and the same shall thereupon operate as relinquishment of the right, title, and interest of the United States in and to the land embraced in said conveyance, and as a guarantee by the United States of the title of said lands to the allottee; and the acceptance of such deed by the allottee shall be a relinquishment of his title to and interest in all other lands belonging to the tribe, except such as may have been excepted from allotment and held in common for other purposes. Each allottee shall designate one tract of forty acres, which shall, by the terms of the deed, be made inalienable and nontaxable as a homestead in perpetuity.

* * * * *

The United States courts now existing, or that may hereafter be created, in Indian Territory shall have exclusive jurisdiction of all controversies growing out of the title,

ownership, occupation, or use of real estate owned by the Seminoles, * * *

Act of March 1, 1901 (31 Stat. 861).

Section 7:

Lands allotted to citizens hereunder shall not in any manner whatsoever, or at any time, be incumbered, taken, or sold to secure or satisfy any debt or obligation contracted or incurred prior to the date of the deed to the allottee therefor and such lands shall not be alienable by the allottee or his heirs at any time before the expiration of five years from the ratification of this agreement, except with the approval of the Secretary of the Interior.

Each citizen shall select from his allotment forty acres of land as a homestead, which shall be nontaxable and inalienable and free from any incumbrance whatever for twenty-one years, for which he shall have a separate deed, conditioned as above: * * *

The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after the ratification of this agreement, but if he have no such issue, then he may dispose of his homestead by will, free from limitation herein imposed, and if this be not done, the land shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, free from such limitation.

Section 44:

This agreement shall in no wise affect the provisions of existing treaties between the United States and said tribe except so far as inconsistent therewith.

Act of June 30, 1902 (32 Stat. 500).

Section 16:

Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain nontaxable, inalienable, and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear. * * *

Act of April 26, 1906 (34 Stat. 137).

Section 19:

That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act, unless such restriction shall, prior to the expiration of said period, be removed by Act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior: * * * *Provided further,* That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee.

Section 23:

Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: *Provided*, That no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States court for the Indian Territory, or a United States Commissioner.

Act of May 27, 1908 (35 Stat. 312).

Section 1:

* * * All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. * * *

* * * * * *

Section 4:

That all lands from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized

Tribes: *Provided,* That allotted lands shall not be subjected or held liable, to any form of personal claim, or demand, against the allottees arising or existing prior to the removal of restrictions, other than contracts heretofore expressly permitted by law.

* * * * *

Section 8:

That section twenty-three of an Act entitled "An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and other purposes," approved April twenty-sixth, nineteen hundred and six, is hereby amended by adding at the end of said section, the words "or a judge of a county court of the State of Oklahoma."

Act of June 14, 1918 (40 Stat. 606).

That a determination of the question of fact as to who are the heirs of any deceased citizen allottee of the Five Civilized Tribes of Indians who may die or may have heretofore died, leaving restricted heirs, by the probate court of the State of Oklahoma having jurisdiction to settle the estate of said deceased, conducted in the manner provided by the laws of said State for determination of heirship in closing up the estates of deceased persons, shall be conclusive of said question: *Provided,* That an appeal may be taken in the manner and to the court provided by law, in cases of appeal in probate matters generally: *Provided further,* That where the time limited by the laws of said State for the institution of administration proceedings has elapsed without their institution, as well as in cases where there exists no lawful ground for the institution of administration proceedings in said courts, a petition may be filed therein hav-

ing for its object a determination of such heirship and the case shall proceed in all respects as if administration proceedings upon other proper grounds had been regularly begun, but this proviso shall not be construed to reopen the question of the determination of an heirship already ascertained by competent legal authority under existing laws: *Provided further,* That said petition shall be verified, and in all cases arising hereunder service by publication may be had on all unknown heirs, the service to be in accordance with the method of serving nonresident defendants in civil suits in the district courts of said State; and if any person so served by publication does not appear and move to be heard within six months from the date of the final order, he shall be concluded equally with parties personally served or voluntarily appearing.

Act of May 10, 1928 (45 Stat. 495) as amended by the Act of May 24, 1928 (45 Stat. 733).

Section 1:

That the restrictions against the alienation, lease, mortgage, or other encumbrance of the lands allotted to members of the Five Civilized Tribes in Oklahoma, enrolled as of one-half or more Indian blood, be, and they are hereby, extended for an additional period of twenty-five years commencing on April 26, 1931: * * *

* * * * *

Section 3:

That all minerals, including oil and gas, produced on or after April 26, 1931, from restricted allotted lands of members of the Five Civilized Tribes in Oklahoma, or from inherited restricted lands of full-blood Indian heirs or devisees of such lands, shall

be subject to all State and Federal taxes of every kind and character the same as those produced from lands owned by other citizens of the State of Oklahoma; and the Secretary of the Interior is hereby authorized and directed to cause to be paid, from the individual Indian funds held under his supervision and control and belonging to the Indian owners of the lands, the tax or taxes so assessed against the royalty interest of the respective Indian owners in such oil, gas, and other mineral production.

Section 4:

That on and after April 26, 1931, the allotted, inherited, and devised restricted lands of each Indian of the Five Civilized Tribes in excess of one hundred and sixty acres shall be subject to taxation by the State of Oklahoma under and in accordance with the laws of that State, and in all respects as unrestricted and other lands: *Provided*, That the Indian owner of restricted land, if an adult and not legally incompetent, shall select from his restricted land a tract or tracts, not exceeding in the aggregate one hundred and sixty acres, to remain exempt from taxation, and shall file with the Superintendent of the Five Civilized Tribes, a certificate designating and describing the tract or tracts so selected: * * * and said lands, designated and described in the approved certificates so recorded, shall remain exempt from taxation while the title remains in the Indian designated in such approved and recorded certificate, or in any full-blood Indian heir or devisee of the land: *Provided*, That the tax exemption shall not extend beyond the period of restrictions provided for in this Act: *And provided further*, That the tax exempt land of any such Indian allottees,

heir, or devisee shall not at any time exceed one hundred and sixty acres.

Act of January 27, 1933 (47 Stat. 777).

* * * That all funds and other securities now held by or which may hereafter come under the supervision of the Secretary of the Interior, belonging to and only so long as belonging to Indians of the Five Civilized Tribes in Oklahoma of one-half or more Indian bloods, enrolled or unenrolled, are hereby declared to be restricted and shall remain subject to the jurisdiction of said Secretary until April 26, 1956, subject to expenditure in the meantime for the use and benefit of the individual Indians to whom such funds and securities belong, under such rules and regulations as said Secretary may prescribe: *Provided,* That where the entire interest in any tract of restricted and tax-exempt land belonging to members of the Five Civilized Tribes is acquired by inheritance, devise, gift, or purchase, with restricted funds, by or for restricted Indians, such lands shall remain restricted and tax-exempt during the life of and as long as held by such restricted Indians, but not longer than April 26, 1956, unless the restrictions are removed in the meantime in the manner provided by law: *Provided further,* That such restricted and tax-exempt land held by anyone, acquired as herein provided, shall not exceed one hundred and sixty acres: *And provided further,* That all minerals including oil and gas, produced from said land so acquired shall be subject to all State and Federal taxes as provided in section 3 of the Act approved May 10, 1928 (45 Stat. 495).

Act of December 24, 1942 (Public Law 833, 77th Cong.), ch. 813, 2d sess.

* * * That exclusive jurisdiction is hereby conferred on the Secretary of the Interior to determine the heirs after notice and hearing under such rules and regulations as he may prescribe, and to probate the estate of any deceased restricted Indian, enrolled or unenrolled, of the Five Civilized Tribes of Oklahoma, whenever the restricted estate consists only of funds or securities under the control of the Department of the Interior of an aggregate value not exceeding $2,500: *Provided,* That where such decedent died prior to the effective date of this Act, the distribution of such funds and securities, including the decedent's share of any tribal funds, shall be made in accordance with the statute of descent and distribution applicable at the date of death: *And provided further,* That where the decedent dies subsequently to the effective date of this Act distribution of all such funds and securities, including tribal funds aforesaid, shall be effected in accordance with the statute of descent and distribution of the State of Oklahoma.

OKLAHOMA STATUTES

Ch. 162, Session Laws 1915.

Section 1. A tax is hereby laid upon the transfer to persons or corporations of property or any interest therein or income therefrom.

When the transfer is of tangible property in this state made by any person, or of intangible property made by a resident of this state at time of transfer:

First: By will or the intestate laws of this state;

Second: By deed, grant, bargain, sale or gifts, made in contemplation of the death

of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death;

Third: When the transferee becomes beneficially entitled in possession or expectancy by any such transfer whether made before or after the passage of this Act. Said tax shall be upon the clear market value of such property.

Section 2. Whenever the property within this state of a resident or non-resident decedent transferred by will is not specifically bequeathed or devised, such property shall for the purpose of this Act be deemed to be transferred proportionally to and divided pro rata among all the general legatees and devisees named in said will, including all transfers under a residuary clause.

* Ch. 66, Art. 5, Session Laws 1935.

Section 1. Inheritance and Transfer Tax.

A tax is hereby levied upon the transfer of the net estate of every decedent, whether in trust or otherwise, to persons, associations, or corporations, of property, real personal or mixed, whether tangible or intangible, or any interest therein or income therefrom, by will or the intestate laws of this state, by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death, whether made before or after the passage of this Act. Such tax shall be imposed upon the value of the net estate and transfers at the rates, under the conditions, and subject to the exemptions and limitations hereinafter prescribed.

U. S. GOVERNMENT PRINTING OFFICE 1943

SUPREME COURT OF THE UNITED STATES.

Nos. 623, 624 and 625.—October Term, 1942.

Oklahoma Tax Commission of the State of Oklahoma, Petitioner, 623 *vs.* The United States of America.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.
Oklahoma Tax Commission of the State of Oklahoma, Petitioner, 624 *vs.* The United States of America.	
Oklahoma Tax Commission of the State of Oklahoma, Petitioner, 625 *vs.* The United States of America.	

[June 14, 1943.]

Mr. Justice Black delivered the opinion of the Court.

The United States brought these three actions to recover inheritance taxes imposed by the State of Oklahoma upon the transfer of the estates of three deceased members of the Five Civilized Tribes and paid under protest by the Secretary of the Interior from funds under his control belonging to those estates. The district court entered judgment on the merits for the state in each case. The Circuit Court of Appeals reversed. 131 F. 2d 635. We granted certiorari because of the importance of the cases in the administration of Indian affairs and to the State of Oklahoma. The basic questions to be decided are whether, as a matter of state law, the state taxing statutes reach these estates, and whether Congress has taken from the State of Oklahoma the power to levy taxes upon the transfer of all or a part of property and funds of these deceased Indians.

The properties of which the estates are composed fall into four main categories: land exempt from direct taxation; land not exempt from direct taxation; restricted cash and securities held for the Indians by the Secretary of the Interior; and miscellaneous

where existing treaties forbade the state's building such roads. Later, for a period of time, Indian lands held in trust by the United States were found to be constitutionally tax exempt on the theory that they were federal instrumentalities, i. e., that the lands were held by the United States for the Indians, and were therefore non-taxable. *United States* v. *Rickert*, 188 U. S. 432. In time, this constitutional concept was expanded to grant tax exemption to the income derived from Indian lands, whether tribally or individually owned, even when the privilege of exploitation had been granted to non-Indian lessees.[4] The instrumentality concept ultimately resulted in a decision exempting Indian estates from taxation. *Childers* v. *Beaver*, *supra*. None of these cases held, nor has this Court ever decided, that congressional restriction of an Indian's income carried an implication of estate tax exemption.

The underlying principles on which these decisions are based do not fit the situation of the Oklahoma Indians. Although there are remnants of the form of tribal sovereignty, these Indians have no effective tribal autonomy as in *Worcester* v. *Georgia*, *supra*; and, unlike the Indians involved in *The Kansas Indians* case, *supra*, they are actually citizens of the State with little to distinguish them from all other citizens except for their limited property restrictions and their tax exemptions.[5] Their lands are held in fee, not in trust, as in the *Rickert* case, and the doctrine of constitutional immunity from taxation for the income of their holdings on the federal instrumentality theory has been renounced. *Helvering* v. *Mountain Producers Corporation*, *supra*. *Childers* v. *Beaver*, *supra*, was in effect overruled by the *Mountain Producers* decision. The immunity formerly said to rest on constitutional implication cannot now be resurrected in the form of statutory implication.

The cash and securities of which these estates are almost entirely composed were restricted by the Act of January 27, 1933.[6] Un-

[4] Choctaw O. & Gulf R. r. Harrison, 235 U. S. 292; Indian Territory Co. v. Oklahoma, 240 U. S. 522; Jaybird Mining Co. v. Weir, 271 U. S. 609; Howard v. Gypsy Oil Co., 247 U. S. 503; Large Oil Co. v. Howard, 248 U. S. 549; Gillespie v. Oklahoma, 257 U. S. 501.

[5] Under the Acts of June 18, 1934, 48 Stat. 984, and June 26, 1936, 49 Stat. 1967, 25 U. S. C. § 501 *et seq.*, some progress has been made in the restoration of tribal government. Cohen, Handbook of Federal Indian Law, 455, 129-133, 142-143.

[6] 47 Stat. 777.

". . . That all funds and other securities now held by or which may hereafter come under the supervision of the Secretary of the Interior, belonging to and only so long as belonging to Indians of the Five Civilized Tribes in

less the tax immunity is granted by the restriction clause itself, there is not a word in the Act which even remotely suggests that Congress meant to exempt Indians' cash and securities from Oklahoma's estate taxes. We conclude that this Act does not exempt the restricted property from taxation for two reasons: (1) the legislative history of the Act refutes the contention that an exemption was intended; and (2) application of the normal rule against tax exemption by statutory implication prevents our reading such an implication into the Act.

The 1933 Act was intended to serve two purposes relevant to this case. One was to continue the restrictions on Indian property for the purpose of protecting the Indians from loss to individuals who might take advantage of them; and the other was to preserve the status of certain Indian land as non-taxable until 1956. See the concurring opinion of Mr. Justice RUTLEDGE in *Seber* v. *United States*, No. 556, decided this term. This Act was before two Congresses, the 71st and the 72nd. It was the subject of exhaustive debate, as well as of several committee reports, and there is no indication whatever in all that discussion of an intention to exempt Indians from estate taxes.[7]

The bill was sponsored by Oklahoma Congressmen who said nothing which supports the imputation that they intended to deprive their state of this income. It was described by its sponsor, Congressman Hastings, as follows:

"You ask me what the bill does. If the Members of Congress understood the bill there would not be a vote against it. Oil

Oklahoma of one-half or more Indian bloods, enrolled or unenrolled, are hereby declared to be restricted . . . *Provided*, That where the entire interest in any tract of restricted and tax-exempt land belonging to members of the Five Civilized Tribes is acquired by inheritance, devise, gift, or purchase, with restricted funds, by or for restricted Indians, such lands shall remain restricted and tax-exempt during the life of and as long as held by such restricted Indians, but not longer than April 26, 1956. . . . *And provided further*, That all minerals including oil and gas, produced from said land so acquired shall be subject to all State and Federal taxes as provided in section 3 of the Act approved May 10, 1928 (45 Stat. 495)."

[7] Elements of the 1933 statute were included in H. R. 15603, 71st Congress. The bill was recommitted to the Committee on Indian Affairs for further consideration, 74 Cong. Rec. 3956-3958. This discussion includes a report of the Department of the Interior recommending legislation substantially similar to that finally enacted in 1933. The House later amended the provisions of its own bill into S. 6169. 74 Cong. Rec. 7219-7222. The bill as amended was not approved by the Senate. The plan was re-introduced in the 72d Congress as H. R. 8750 and was discussed by the House at 75 Cong. Rec. 8163-8170, and by the Senate at 76 Cong. Rec. 2200. This bill was passed by the 72d Congress and became the statute under consideration.

has been struck underneath some of the lands allotted to the members of these tribes. Some of these full-blood allottees without business experience, now have to their credit $100,000, $200,000, and it is estimated, up to $1,000,000. Suppose one of these Indian allottees died after April 26, 1931. Then this money must be turned over to these heirs without supervision. Do you want to do that? Is there a man on the floor of the House who would want to do that?"[8]

This purpose, and none other, is reiterated throughout the discussion—not a word of an intention to expand tax exemptions was spoken by any Congressman.

The legislative history not only fails to give any affirmative support to such an implication but expressly negatives that intent. The principal clause of the bill dealing with taxation is that which continues a limited land tax exemption for twenty-five years. On two separate occasions, in two Congresses, the bill's sponsor assured the House of Representatives: "This [bill] only applies to restricted and tax-exempt land. This does not increase tax-exempt land at all."[9] Such a bill, carefully drawn so as not to widen tax exemptions for land, and without a word of such intent in its legislative history, cannot be supposed by implication to have prohibited estate taxes. If there could be any doubt of this proposition it is surely removed by a later clause of the 1933 statute which provides that all minerals extracted from the land should be subject to state taxation.[10] Congress could not have intended that the minerals themselves should be subject to taxation, but that the proceeds of their sale, even further removed from the land itself, should be immune.

This Court has repeatedly said that tax exemptions are not granted by implication. *United States Trust Co.* v. *Helvering*, 307 U. S. 57, 60. It has applied that rule to taxing acts affecting Indians as to all others. As was said of an excise tax on tobacco produced by the Cherokee Indians in 1870, "If the exemption had been intended, it would doubtless have been expressed." *Cherokee Tobacco*, 11 Wall. 616, 620. In holding the income tax applicable to Indians, the Court said, "The terms of the 1928 Revenue Act are very broad and nothing there indicates that Indians are to be excepted. . . . If exemption exists it must derive plainly

[8] 75 Cong. Rec. 8163.

[9] 74 Cong. Rec. 7222 and, similarly, 75 Cong. Rec. 8170.

[10] See the last clause of the statute as set forth in Note 6, *supra*.

from agreements with the Creeks or some Act of Congress dealing with their affairs." *Superintendent* v. *Commissioner, supra,* 420. If Congress intends to prevent the State of Oklahoma from levying a general non-discriminatory estate tax applying alike to all its citizens, it should say so in plain words. Such a conclusion can not rest on dubious inferences. "Nontaxability and restriction upon alienation are distinct things," *Superintendent* v. *Commissioner, supra,* 421, and when Congress wants to require both nonalienability and nontaxability it can, as it has so often done, say so explicitly.[11]

It is true that our interpretation of the 1933 statute must be in accord with the generous and protective spirit which the United States properly feels toward its Indian wards, but we cannot assume that Congress will choose to aid the Indians by permanently granting them immunity from taxes which they are as able as other citizens to pay. It runs counter to any traditional concept of the guardian and ward relationship to suppose that a ward should be exempted from taxation by the nature of his status, and the fact that the federal government is the guardian of its Indian ward is no reason, by itself, why a state should be precluded from taxing the estate of the Indian. We have held that the Indians, like all other citizens, must pay federal income taxes. *Superintendent* v. *Commissioner, supra,* 421. "Wardship with limited power over his property" did not there "without more render [the Indian] immune from the common burden." A federal court has held, in a well reasoned decision defended before us by the Solicitor General of the United States, who is not a party to this action, that an Indian's estate is subject to the federal estate tax. *Landman* v. *Commissioner,* 123 F. 2d 787.[12] Congress cannot have intended to impose federal income and inheritance taxes on the Indians and at the same time exempt them by implication from similar state taxes.

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[11] See, for examples, Act of July 1, 1898, 30 Stat. 567, tract made "inalienable and nontaxable;" Act of March 1, 1901, 31 Stat. 861, tract made "nontaxable and inalienable;" Act of June 30, 1902, 32 Stat. 500, tract to remain "nontaxable, inalienable, and free from any incumbrance;" Act of April 26, 1906, 34 Stat. 137, "all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation." Cf. for special treatment of the Quapaw Indians the Act of April 17, 1937, 50 Stat. 68.

[12] Cert. den., 315 U. S. 810. The Department of the Interior in the Landman case made substantially the same argument it makes here against taxation of Indians' estates. It emphasizes that the decision of the Circuit Court of Ap-

Congress has passed laws under which Indians have become full fledged citizens of the State of Oklahoma.[13] Oklahoma supplies for them and their children schools, roads, courts, police protection and all the other benefits of an ordered society. Citizens of Oklahoma must pay for these benefits. If some pay less, others must pay more. Since Oklahoma has become a state, it has been authoritatively stated that tax losses resulting from tax immunity of Indians have totaled more than $125,000,000, a sum only slightly less than the bonded indebtedness of the state.[14] If Congress intended to relieve these Indians from the burden of a state inheritance tax as a consequence of our national policy toward Indians, there is still no reason why we should imply that it intended the burden to be borne so heavily by one state. But there is a complete absence of any evidence of congressional belief that these exemptions are required on equitable grounds, no matter on which sovereign the burden falls. Here is a tax based solely

peals would lead to similar taxation by states. The Solicitor General, opposing the Department of the Interior in the Landman case, insisted that under Superintendent v. Commissioner, 295 U. S. 418, and Choteau v. Burnet, 283 U. S. 691, the Indians' estates should be subjected to taxation; and that even if the Indians' lands were exempt from direct taxation, the estate tax should be upheld as an excise tax, indirect in its nature, citing United States Trust Co. v. Helvering, 307 U. S. 57; Plummer v. Coler, 178 U. S. 115; Greiner v. Lewellyn, 258 U. S. 384. In other words, the Solicitor General in seeking to uphold the validity of a federal estate tax as applied to Indian estates opposed the argument which the Department of the Interior made then and which it makes now, the only difference being that in the instant case the Department of the Interior is seeking to invalidate a state instead of a federal tax.

[13] It must not be assumed that the Oklahoma Indians are all unable to pay estate taxes. The estates of the three Indians here involved, as has been noted, total well over $1,200,000. Oil and gas receipts of the Five Civilized Tribes from 1904 to 1937 were in excess of one hundred million dollars. Hearing on S. Res. 168, Senate Committee on Indian Affairs, 75th Cong., 3rd Sess., p. 36. The Osages in the same period received $261,000,000. p. 34. Annual per capita income for the Osage Tribe as shown by a careful study made in 1928 was $19,119. The Problem of Indian Administration, Institute for Government Research, Lewis Meriam, Director, chapter 10, General Economic Conditions, 430, 450. 2,826 Osage Indians are reported to own tribal and individual property valued at $31,968,000. p. 443. The economic status of the Osages is discussed in McCurdy v. United States, 246 U. S. 263, 265.

For a discussion of the respected position of Indians in Oklahoma, see the dissenting opinion of Judge Williams, Board of County Commissioners v. Seber, 130 F. 2d 663, 681-683. The 1933 Act discussed above was sponsored in the House of Representatives by Congressman Hastings of Oklahoma, who was himself of Indian descent.

[14] Hearings before the Senate Committee on Indian Affairs, note 13, *supra*, p. 4.

on ability to pay.[15] "Only the same duties are exacted as from our own citizens. The burden must rest somewhere. Revenue is indispensable to meet the public necessities. Is it unreasonable that this small portion of it shall rest upon these Indians?" *The Cherokee Tobacco, supra,* p. 621.

Recognizing that equality of privilege and equality of obligation should be inseparable associates, we have recently swept away many of the means of tax favoritism. *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466 permitted States to impose income taxes upon government employees and *Helvering* v. *Gerhardt*, 304 U. S. 405, permitted the federal government to impose taxes on state employees. *O'Malley* v. *Woodruff*, 307 U. S. 277, overruled a previous decision which held that judges should not pay taxes just as other citizens, and *Helvering* v. *Mountain Producers Oil Corp., supra,* repudiated former decisions seriously limiting state and federal power to tax. See also *Metcalfe* v. *Mitchell*, 269 U. S. 514, and *James* v. *Dravo Contracting Co.*, 302 U. S. 134. The trend of these cases should not now be reversed.

What has been said requires the conclusion that the cash and securities are not exempted by any existing legislation from state estate taxation, and this is likewise true of the personal property in two of these estates.

The validity of the taxes on the transfer of the land presents a somewhat different problem. Some of these lands are exempt from direct taxation by virtue of explicit congressional command. The Act of May 10, 1928, 45 Stat. 493, for example, provides that Indians of a class which includes the three deceased should select up to 160 acres of his allotted, inherited or devised restricted lands, which "shall remain exempt from taxation while the title remains in the Indian designated . . . or in any full-blood Indian heir or devisee", while all other restricted lands are made subject to taxation by Oklahoma. The state argues that congressional exemption of the land from direct state taxation does not exempt the land from an estate tax, because of the principles announced in *United States Trust Co.* v. *Helvering, supra.* A majority of the Court concludes that this principle does not apply to

[15] "The view of the survey staff is that the Indians must be educated to pay taxes just as they must be educated to do other things. The taxes imposed upon them must always be properly related to their capacity to pay. For them an income tax would be infinitely better than a general property tax because of its direct relationship to their capacity to pay. The returns from such a tax would obviously be extremely small at the outset, but they would increase with the increasing productivity of the Indians." The Problem of Indian Administration, note 13, *supra,* 478; and see also 43, 98.

Indian lands specifically exempted from direct taxation. We therefore hold that the transfer of those lands which Congress has exempted from direct taxation by the state are also exempted from estate taxes.

To summarize:

In No. 623, the transfer of the cash and securities is taxable. the transfer of the homestead and other allotted land, exempted under the Act of May 10, 1928, is not. The 43 acres purchased for the intestate from her restricted funds was taxable at the time of her death, *Shaw* v. *Gibson-Zahniser Oil Corp.*, 276 U. S. 475, and hence is subject to the estate tax.

In No. 624, the transfer of the cash and securities and the personal property is taxable. The deceased died before the Act of May 10, 1928, took effect, but her 240-acre holding was specifically exempt from direct taxation at the time of her death under § 19 of the Act of April 26, 1906, and the transfer of lands is therefore not taxable.

In No. 625, the same result as in No. 623 follows for the restricted lands which were appropriately selected for exemption under the Act of May 10, 1928, and for the personal property, cash, and securities. The judgment and the insurance policy are to be treated as in a class with the personal property, cash, and securities. It is conceded that the 160 acres of inherited property held by the deceased was taxable at the time of his death because in excess of the exemption permitted by the 1928 Act, and this land is, therefore, subject to the estate tax. While the status of the deceased 4/5's interest in a 40-acre tract is not clear from the record, no showing has been made that it is not taxable.

The government is entitled to recovery of the estate tax paid on the transfer of lands exempt from direct taxation, and to no more. The judgment below is vacated and the cause is remanded to the district court for further proceedings consistent with this opinion.

It is so ordered.

Mr. Justice DOUGLAS.

I concur in the result and in the disposition of the case. While I agree that transfers of the restricted Indian lands are not subject to Oklahoma's estate tax, I take the contrary view as respects the funds and securities covered by the Act of January 27, 1933, 44 Stat. 777. In my opinion transfers of those funds and securities are subject to the tax for the two reasons set forth in the opinion of the Court.

SUPREME COURT OF THE UNITED STATES.

Nos. 623, 624 and 625.—October Term, 1942.

Oklahoma Tax Commission of the State of Oklahoma, Petitioner, 623 *vs.* The United States of America.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.
Oklahoma Tax Commission of the State of Oklahoma, Petitioner, 624 *vs.* The United States of America.	
Oklahoma Tax Commission of the State of Oklahoma, Petitioner, 625 *vs.* The United States of America.	

[June 14, 1943.]

Mr. Justice Murphy, dissenting in part.

I dissent because the opinion of the Court rejects a century and a half of history. We are not here dealing with mere property or income that is tax exempt. This is not the ordinary case of government and its citizens, or a group of citizens who seek to avoid their obligations. Our concern here is entirely different. It is with a people who are our wards and towards whom Congress has fashioned a policy of protection due to obligations well known to all of us. It rests with Congress to choose when we are done with that trusteeship. Meanwhile it is our obligation to interpret in the light of the history of that relationship all legislation which Congress has enacted to carry out its Indian policy.

Normally it is true that strong considerations of fiscal and social policy view tax exemptions with a hostile eye. Such exemptions are not to be lightly implied, and every reasonable implication in construing legislation is to be made against their grant. But this general doctrine against tax exemption is irrelevant in considering the taxing power of a state in relation to Indians. For as to them a totally different principle comes into

operation, namely, the special status of Indians during the whole course of our constitutional and legal history. There can be no doubt of Congress' plenary power to exempt Indians and their property from all forms of state taxation. Such power exists to prevent impairment of the manner in, or means by which Congress effectuates its Indian policy, at least so long as Congress has not determined that the interests of the Indians require their complete release from tutelage or the final termination of the United States' guardianship over them. *Board of Commissioners* v. *Seber*, — U. S. —, No. 556 this Term; cf. *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 315-16; *Brader* v. *James*, 246 U. S. 88, 96; *United States* v. *McGowan*, 302 U. S. 535, 538. See *United States* v. *Sandoval*, 231 U. S. 28, 45-47. To deny such constitutional power is to deny the presupposition of all legislation relating to Indians as well as an unbroken line of decisions on Indian law in this Court and all that underlies them. This course of legislation and adjudication may be fairly summarized as recognizing the special relation of Indians toward the United States and the exclusion of state power with relation to them, except in so far as the federal government has actually released to the state governments its constitutional supremacy over this special field. Therefore, so far as the power of state to tax Indian property is concerned, the ordinary rule of tax exemption is reversed; a state must make an affirmative showing of a grant by Congress of the withdrawal of the immunity of Indian property from state taxation. This is so because it is Indian property and because Indians stand in a special relation to the federal government from which the states are excluded unless the Congress has manifested a clear purpose to terminate such an immunity and allow states to treat Indians as part of the general community.

Congress has manifested no such purpose with regard to the estates of the deceased Indians before us. On the contrary, those Indians were subject to federal control.[1] Most of their allotted

[1] The deceased Indians in these three cases were enrolled full-blood Indians of the Five Civilized Tribes. Two were Seminoles and one was a Creek. Congress has not terminated the guardianship relation with respect to these tribes. They still exist (§ 28 of Act of April 26, 1906, 34 Stat. 137), and have recently been authorized to resume some of their former powers (Act of June 26, 1936, 49 Stat. 1967). Congress has regarded their members of the half Indian blood or more, whether enrolled or not, as restricted tribal Indians subject to federal control. The fact that these Indians are citizens is not inconsistent with their restricted status or the exercise of federal supervision over them. See Board of Commissioners v. Seber, *supra*; Glenn v. Lewis, 105 F. 2d 398.

lands were expressly exempt from taxation, and, as the opinion of the Court recognizes, this removed them from the operation of Oklahoma's estate tax.[2] But apart from these express exemptions, the bulk of the properties in the three estates were restricted against alienation and encumbrance by various acts of Congress.[3] History, as well as statements of Congress itself,[4] leave no doubt that property so restricted is beyond the taxing power of the states, unless and until Congress gives its consent. In other words restriction is tantamount to immunity from state taxation. That was the basis of decision in *Choctaw & Gulf R. R.* v. *Harrison*, 235 U. S. 292; *Indian Oil Co.* v. *Oklahoma*, 240 U. S. 522; *Jay Bird Mining Co.* v. *Weir*, 271 U. S. 609; *Howard* v. *Gipsy Oil Co.*, 247 U. S. 503; *Large Oil Co.* v. *Howard*, 248 U. S. 549; *Gillespie* v. *Oklahoma*, 257 U. S. 501. In all those cases a non-Indian lessee of restricted Indian lands was held immune from state taxation of various kinds because, and only because, the lands themselves and the leasing of them were held to be immune from taxation, and this in turn because they were the lands of Indians held in Government tutelage, who were permitted to lease the lands only with the approval of the Secretary of the Interior. This immunity for lessees was withdrawn by *Helvering* v. *Producers Corp.*, 303 U. S. 376, which overruled *Gillespie* v. *Oklahoma*, *supra*. Cf. the dissenting opinions in *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393. In neither the *Coronado* case nor in the *Producers* case was there any contention that the land in the hands of the lessors was subject to taxation. That was recognized and accepted as correct. The point was that even though the land was tax immune in the hands of the lessor, the lessor's immunity did not extend to the lessee who had no personal immunity and who acquired the land for his own purposes and made a profit from it. In other words, the

[2] See Act of July 1, 1898, 30 Stat. 567; Act of March 1, 1901, 31 Stat. 861; Act of June 30, 1902, 32 Stat. 500; § 19 of Act of April 26, 1906, 34 Stat. 137; § 4 of Act of May 10, 1928, 45 Stat. 495 and 733.

The fact that the exemptions do not mention inheritance or estate taxes is unimportant. As pointed out before, contrary to the general rule Indian tax exemptions are to be liberally construed. See Carpenter v. Shaw, 280 U. S. 363, 366-67. For that reason decisions, such as U. S. Trust Co. v. Helvering, 307 U. S. 57, that statutory exemptions from taxation do not include an exemption from estate taxes, have no application here.

[3] In addition to the statutes cited in Note 2, *supra*, see also Act of May 27, 1908, 35 Stat. 312; and Act of January 27, 1933, 47 Stat. 777.

[4] See Note 12, *infra*.

withdrawal of immunity from a non-Indian lessee of restricted Indian land rests upon the remoteness of the effect of that taxation upon such Indian property, cf. *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, not upon a notion that Congress did not intend by imposing restrictions to prohibit state taxation of the interest of Indians in their restricted property, nor upon the supposition that Congress lacks power to do so. Congress plainly has power to implement its Indian policy by forbidding state taxation to burden the interest of an Indian in his property. Cf. *Shaw* v. *Oil Corp'n*, 276 U. S. 575; *Board of Commissioners* v. *Seber*, — U. S. —, No. 556 this Term. It exercises that power simply by imposing the restrictions.

That Congress has considered the restriction of Indian property against alienation and encumbrance as carrying with it immunity from state taxation for the period of the restriction is clear not only from statements of Congress itself to that effect,[5] but also from the long history of such restrictions and the purpose sought to be achieved, the protection of a dependent people from their own improvidence and the exploitation of others.

Congress early established the complete and exclusive control of the Federal Government over the purchase and disposition of Indian lands, both tribal and individual.[6] The protection afforded by those and subsequent restrictive acts and treaties extended to trespasses, transfers, tax sales, tax liens, and other attempted interferences by the state governments with federal control over Indian lands. See *Worcester* v. *Georgia*, 6 Pet. 515; *The Kansas Indians*, 5 Wall. 737; *The New York Indians*, 5 Wall. 761.

The United States was unable, however, to prevent state interference with the Creeks and the Seminoles in their domains east of the Mississippi, and accordingly proposed removal west of the Mississippi, guaranteeing that there no State or Territory should "ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves, so far as may be compatible with the general jurisdiction which Congress may think proper to exercise over them." Article XIV, Treaty of March 24, 1832 (7 Stat. 366). Long after the removal this guarantee was reaffirmed. Article IV, Treaty of August 7, 1856 (11 Stat. 699). Nothing in the subsequent treaties and

[5] See Note 12, *infra*.

[6] Indian Trade and Intercourse Acts of July 22, 1790, 1 Stat. 137; March 1, 1793, 1 Stat. 329; March 3, 1799, § 12, 1 Stat. 743, 25 U. S. C. § 177.

allotment acts relating specifically to the Creeks and the Seminoles was inconsistent with this guarantee of freedom from state control.[7] And Congress was careful to provide that nothing in the creation of the State of Oklahoma should qualify this promise. Thus the Oklahoma Enabling Act (34 Stat. 267) provided that the Oklahoma Constitution should not "limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this Act had never been passed." The constitution adopted by the people of Oklahoma renounced any claims to Indian lands (Art. 1, § 3), and exempted from taxation "such property as may be exempt by reason of treaty stipulations, existing between the Indians and the United States Government, or by Federal laws during the force and effect of such treaties or Federal laws" (Art. X, § 6). See *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 309; *Ex parte Webb*, 225 U. S. 663, 682-83; *Ward* v. *Love County*, 253 U. S. 17; *Carpenter* v. *Shaw*, 280 U. S. 363, 366.

As we recently said in *Board of Commissioners* v. *Seber*, *supra*, Congress in 1887 turned from a policy of protecting Indian tribes in the possession of their domains to a program, now discontinued, of assimilating the Indians through dissolution of their tribal governments and the compulsory individualization of their lands. This allotment program evolved out of the historical background sketched above, and took its cue from the previous protection and freedom from state control accorded Indians and their lands. The Indian surrendered tribal land, protected against state taxation as well as against all other forms of voluntary and involuntary encumbrance and alienation. Cf. *The Kansas Indians*, *supra*; *The New York Indians*, *supra*. Under the various allotment acts he received in return land which was intended to have the same measure of protection for a temporary period, generally subject to extension. Thus the General Allotment Act of 1887 (24 Stat. 388) provided for the issuance to allottees of trust patents which were to declare: "the United States does . . . hold the land thus allotted, for the period of twenty-five years, in trust

[7] See Treaty of March 21, 1866, 14 Stat. 755; Treaty of June 14, 1866, 14 Stat. 785; Curtis Act of 1898, 30 Stat. 495; Act of July 1, 1898, 30 Stat. 567; Act of March 1, 1901, 31 Stat. 861; Act of June 30, 1902, 32 Stat. 500.

v. *Trapp*, 224 U. S. 665, 673, but this of course does not mean that the concepts of restriction and immunity from state taxation are unrelated. Nor does the circumstance that some of the applicable statutes expressly provide specific tax exemptions for restricted lands indicate that restriction is not tantamount to immunity from state taxation.[14] At the time the allotments to the members of the Five Civilized Tribes were made there was no State of Oklahoma. It had been held that Congress had power to lay taxes upon Indian property within Indian Territory, *The Cherokee Tobacco*, 11 Wall. 616, and its creature, the Territorial government, was agitating for the taxation of Indian property.[15] Restrictions, designed to protect the Indians from themselves and the actions of third parties, including state governments, did not bar taxation by the federal government which was the guardian of their interests.[16] Accordingly, specific tax exemptions were written into the allotment acts.[17] Express provisions as to the taxable status of restricted property in the later legislation appear only where the immunity is being limited and expressly waived in part, or the restrictions are being changed.[18]

All of the lands which the opinion of the Court holds immune from Oklahoma's estate tax because of express exemptions were therefore also exempt at the moment of death on the additional ground that they were then subject to restrictions imposed by Congress and the concomitant tax immunity had not been waived. The other restricted lands in the estates are lands to whose taxation Congress has specifically consented, or else were of the type to be taxable at the time of death under the decision in *Shaw v. Oil Corp'n*, 276 U. S. 575.

The origin of restrictions upon the fund of members of the Five Civilized Tribes is somewhat different from that upon the lands, but the effect of the restrictions upon the taxability of the cash and securities in the three estates with which we are

[14] Act of July 1, 1898, 30 Stat. 567; Act of March 1, 1901, 31 Stat. 861; Act of June 30, 1902, 32 Stat. 500; § 19 of Act of April 26, 1906, 34 Stat. 137; § 4 of the Act of May 10, 1928, 45 Stat. 495 and 733.

[15] See Sen. Doc. 109, 58th Cong., 2d Sess.

[16] It is for this historical reason that cases such as Superintendent v. Commissioner, 295 U. S. 418, and Landman v. Commissioner of Internal Revenue, 123 F. 2d 787, have no bearing upon a consideration of the effect of restrictions upon the power of a state to tax.

[17] See Act of July 1, 1898, 30 Stat. 567; Act of March 1, 1901, 31 Stat. 861; Act of June 30, 1902, 32 Stat. 500.

[18] Act of April 26, 1906, 34 Stat. 137; Act of May 10, 1928, 45 Stat. 495.

dealing is the same. Proceeds from sales or leases of restricted lands have always been regarded as "trust" or "restricted" funds by the Secretary of the Interior, who by regulations has required them to be paid to him or his representatives and held for the benefit of the Indian owner.[19] The validity of those administrative restrictions and the power of the United States to enforce them have been recognized. *Parker* v. *Richard*, 250 U. S. 235; *Mott* v. *United States*, 283 U. S. 747. And it has been held that funds so restricted by departmental regulation are exempt from state and local taxation. See *United States* v. *Thurston County*, 143 Fed. 287; *United States* v. *Hughes*, 6 F. Supp. 972. But we do not have to consider whether this administrative restriction alone is sufficient to confer tax exemption upon the cash and securities in the three estates.[20]

The Act of January 27, 1933 (47 Stat. 777), imposes Congressional restrictions by providing:

"That all funds now held or which may hereafter come under the supervision of the Secretary of the Interior, belonging to and only so long as belonging to Indians of the Five Civilized Tribes in Oklahoma of one-half or more Indian blood, enrolled or unenrolled, are hereby restricted and shall remain subject to the jurisdiction of said Secretary until April 26, 1956, . . ."

This Act does not stand alone. It is part of Congress' long continued program of protection and it carries with it the gloss of the history of the restrictions outlined above. Congress was not imposing restrictions for the first time, and there is nothing to suggest that Congress intended them to have less than their traditional historical meaning of tax exemption in this Act. It is immaterial that the legislative history of the Act is silent with regard to the tax status of Indian funds. We are dealing not with a word, nor with an act, but with a course of history. That

[19] Since 1908 the regulations prescribed by the Secretary under § 2 of the Act of 1908, 35 Stat. 312 and related statutes governing oil, gas and other mining leases of restricted lands, have recognized that proceeds from such leases are restricted and have required that all such money be paid to a representative of the Secretary. See 25 CFR §§ 183.18, 183.20; see also § 20 of the regulations approved April 20, 1908.

[20] In Shaw v. Oil Corp., 276 U. S. 575, the interest of an oil lessee in land purchased for an Indian by the Secretary of the Interior with the Indian's restricted funds and conveyed to the Indian by a restricted form of deed pursuant to conditions imposed by the Secretary, was held subject to an Oklahoma oil production tax. The opinion emphasized the difference between "a mere conveyancer's restriction" and action by Congress

course makes it clear that the restricted funds in these estates were beyond the taxing power of Oklahoma.[21]

It is not our function to speculate whether it is wise at this late day to relieve from the ordinary burden of taxation Indians who enjoy the privileges of citizenship and who in some instances are persons of substantial means. Nor is it our legitimate concern that grants of tax exemption to Indian inhabitants may create serious fiscal problems in some states or in their local governmental subdivisions. Those matters, as well as the character, extent and duration of tax exemptions for the Indians, are questions of policy for the consideration of Congress, not the courts. *Board of Commissioners* v. *Seber, supra.* Our inquiry is not with what Congress might or should have done, but with what it has done. That inquiry can be answered here only by holding that the restricted funds in these estates, as well as the lands which the Court holds immune, were not subject to Oklahoma's estate tax.

The CHIEF JUSTICE, Mr. Justice REED and Mr. Justice FRANKFURTER join in this dissent.

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[21] Two of the decedents died before the Act was passed. The House Committee report, however, makes it clear that the restriction on funds was intended to be declaratory and retroactive. H. Rep. No. 1015, 72d Cong., 1st Sess. In view of this there is no reason why the restricted funds in the estates of those decedents, held by the Secretary, should not be deemed covered by that Act, and hence tax exempt by virtue of the restrictions.